

***United States Court of Appeals  
for the  
District of Columbia Circuit***



**TRANSCRIPT OF  
RECORD**





No. 11859

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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MONTE W. DURHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF COLUMBIA

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*United States Court of Appeals*

*For the*

*District of Columbia Circuit*

*FILE*

1954

*Joseph D. Stewart*

CLERK

## STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

1. Whether, the Government is deprived of the benefit of the presumption of sanity, when the defense raises the issue of insanity, of which some testimony is adduced but which the defense admits does not meet the legal tests for determining criminal culpability as defined in this jurisdiction and by the Supreme Court?

2. Whether, the defense of insanity need create a "reasonable doubt" by defined legal tests that determine a casual relation between the diseased mind and the criminal act; or whether any evidence of mental abnormality not associating in fact the abnormality with the criminal act can be considered sufficient to raise a doubt as to whether the accused is legally culpable?

3. Whether, the question of acquittal on the grounds of insanity may be decided by application of defined legal tests to the whole evidence in the case to determine if there exists a doubt sufficient to obviate guilt beyond a reasonable doubt; or whether the trial court must ignore such tests where a medical psychiatrist expresses the opinion that the accused was generally of unsound mind on the date of the criminal offense?

(I)

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11859

MONTE W. DURHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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*APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA*

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## SUPPLEMENTAL BRIEF FOR APPELLEE

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### COUNTERSTATEMENT OF THE CASE

This case has been previously briefed on appeal and was orally argued on October 26, 1953; thereafter, this court appointed appellant new counsel to further prosecute the appeal.

Present counsel was granted a request on November 24, 1953, to file a supplemental brief on behalf of appellant, with opportunity to argue thereon before this court.

Appellee's original brief, filed October 1, 1953, set forth a factual narration of the evidence adduced at the trial against Monte Durham on a charge of housebreaking and larceny, at 3030 Q Street N.W., Washington, D. C., on July 13, 1951 (App. Br., pp. 1-9). The Government's case was not rebutted and appellant was found guilty, March 20, 1953 (J. A. 65). Appellant's motion for bail pending appeal was denied by this court on December 11, 1953.

Appellant's supplemental brief only raises the issue of the adequacy of the defense of insanity interposed at the trial.

**STATUTES INVOLVED**

The pertinent parts of the District of Columbia Code (1951 Ed.), Title 22, Sections 1801, 2201 and 2202, are set out in appellee's original brief, pp. 9-11.

**SUMMARY OF ARGUMENT****I**

Where, appellant raised the defense of insanity at the time of trial, he thereby assumed the affirmative obligation to present evidence sufficient to create a reasonable doubt of sanity; and before the prosecution is deprived of its right to the presumption of sanity at the time the criminal offense is committed, the defensive evidence must be relevant with respect to the legal culpability of the accused to commit the specific crime under judicial investigation.

Where, a psychiatrist expresses the opinion that the accused was mentally unsound on the date of the offense but cannot evaluate that condition of unsoundness to the extent it negates accused's understanding and appreciation for the nature of the criminal act, that defensive testimony does not raise a legal doubt with such certitude that the court is required to enter judgment of acquittal.

Where, the evidence in the entire case may cause reasonable men to differ as to a reasonable inference of legal culpability, it is the province of the jury, or a judge sitting without a jury, to weigh and determine this ultimate question; and such a determination may not be overturned on appeal unless it shocks the conscience of the court.

**ARGUMENT**

**I. Where the defense raises the question of insanity, it has the affirmative obligation to present evidence sufficient as to create a reasonable doubt of sanity; and further, the doubt raised must be with respect to the accused's culpability to commit the crime under judicial investigation**

Appellant's supplemental brief narrows the issue presented on this appeal to "solely the question whether, on this record,

appellant was criminally responsible at the time of the commission of the crime: July 13, 1951" (Br. 5).

Appellant argues that there is "an extraordinary mass of evidence respecting appellant's mental capacity to commit the crime" (Br. 7); and yet, alleges the court below rejected the defense on an "hypothesis" that the evidence must establish "that appellant was incapable of distinguishing right from wrong [as] essential to overcome the presumption of sanity and indispensable to a conclusion that appellant was not criminally responsible" (Br. 7).

Appellant further argues that in order to establish the defense of insanity it is unnecessary that the evidence comply with any legal norms determining criminal culpability to commit a crime; but if such is required, then the legal test is inopposite to psychiatric tests and recommends a test which focuses not on "intellectual capacity to discern right from wrong but upon the total competence of the accused, both rational and emotional, to regulate his conduct in accordance with the norms of society" (Br. 4).

On the contrary, the so-called "mass of evidence" was not relevant to establish the fact of Monte Durham's "mental capacity to commit the crime," at least to the extent of creating a reasonable doubt thereof by way of application of the law of this jurisdiction to the facts of the case.

There is no dispute as to the commission of the crime in this instance and that appellant stands guilty thereof beyond a reasonable doubt, except for the determination of whether the defense of insanity was legally effective to exonerate for the crime.

Of course, the prosecution has the burden of proof with respect to every element essential to the proof of the crime, in quality beyond a reasonable doubt. Mental capacity to formulate criminal intent is presumed at law—beyond a reasonable doubt—until there is injected into the evidence as a whole that there be a "reasonable doubt," *Davis v. United States*, 160 U. S. 469, 486, 16 S. Ct. 353, 40 L. Ed. 499 (1895); *Tatum v. United States*, 88 U. S. App. D. C. 386, 389, 190 F. 2d 612 (1951).



In the *Davis* case, 160 U. S. at p. 486, the Supreme Court stated with respect to the rebuttable nature of the presumption sanity:

Consequently the law presumes that every one charged with crime is sane, and this supplies in the first instance the *required proof* of capacity to commit crime. It authorizes the jury to assume at the outset that the accused is criminally responsible for his acts. But that is not a conclusive presumption, which the law upon grounds of public policy forbids to be overthrown or impaired by *opposing proof*. [Emphasis supplied.]

Nothing in the Government's case in chief in this instance raised a reasonable doubt with respect to appellant's mental capacity to commit the crimes of burglary and larceny on July 13, 1951. It could be inferred from the testimony of the police officers in this case that appellant displayed no particular symptoms of a deranged mind on the date of the offense.

Officer Miller, of the Metropolitan Police Department, testified that upon arrival at 3:30 a. m., July 13, 1951, at premises 3030 Q Street N.W., and entering through a smashed glass door he observed "a man crouching in the corner of the dining room" and ordered him to "get up and keep his hands in the air"; and that appellant thereupon arose, dropping a man's suit he was clutching in his hands (J. A. 10-11).

Appellant was taken to No. 7 Precinct Police Station, was questioned by police detective, Pasquale D'Ambrosio, who testified:

A. Monte Durham was questioned in regard to his part of breaking and entering the house at 3030 Q Street.

Q. What did he say?

A. He admitted his part in it.

The COURT. Just what did he say?

A. He said, yes, he went there, that they had been drinking earlier in the evening over on H Street Northeast and he, in company with a fellow by the name of Bishop, Davis and Statterwhite, and he said the police surprised him and two other fellows while they were in the process of going through the house (J. A. 15).



The detective further testified that appellant implicated "Satterwhite," as follows:

A. Well, Bishop and Davis were apprehended at the time, along with Durham, and Durham implicated the fourth member who was Satterwhite and said that he could be reached at 1025 North Capitol Street, I believe (J. A. 15).<sup>1</sup>

#### 1. Reasonable doubt

Therefore, the defense assumed the affirmative obligation of impairing or weakening the force of the legal presumption in favor of sanity. In this jurisdiction, the defense is not required to prove insanity "beyond a reasonable doubt"; rather, the defense is entitled to an acquittal of the specific crime charged if upon "all the evidence there is reasonable doubt" whether appellant was capable in law of committing the crime. *Davis v. United States, supra*, 160 U. S., at p. 484.

This doctrine was approved by this court in the case of *Tatum v. United States, supra*, 80 U. S. App. R. C., at p. 389, wherein the court quoted from the *Davis* case, as follows:

Giving to the prosecution, where the defense is insanity, *the benefit in the way of proof of the presumption in favor of sanity*, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond a reasonable doubt. *If the whole evidence, including that supplied by the presumption of sanity*, does not exclude beyond a reasonable doubt the hypothesis of insanity, *of which some proof is adduced*, the accused is entitled to an acquittal of the specific offense charged.<sup>2</sup> [Emphasis supplied.]

<sup>1</sup> See Appellee's Brief, p. 5 for the denial by appellant of any "memory" of the crime.

<sup>2</sup> In the *Tatum* case, *supra*, 80 U. S. App. D. C., at p. 389, this court cited in footnote (6) under the statement, "That is the rule followed by the Supreme Court and by this court," the case of *Cunningham v. The State*, 56 Miss. 269, 273 (1879), which stated: "Three district theories are held by courts and text-writers of the highest character, and each may be supported by a long array of respectable authorities, viz: 1. The prisoner must

What is the essence of "some proof" in a criminal trial where insanity is put in issue, "[means a] burden \* \* \* on the accused to overcome the presumption of sanity by evidence sufficient to create a reasonable doubt as to his mental capacity to commit the offense," *Holloway v. United States*, 80 U. S. App. D. C. 3, 4, 148 F. 2d 665 (1945), *cert. denied*, 334 U. S. 852 (1948). This Court, in the *Tatum* case, also cited *Holloway* for this principle.

It appears the prosecution is not deprived of the presumption of sanity merely upon the defense asserting insanity; there must be proof sufficient to create a "reasonable doubt" of appellant's capacity to commit the offense. Weighing the question of doubt is upon the whole evidence, always giving to the prosecution the benefit of the presumption of sanity. This presumption is counterbalanced by the presumption of innocence that "follows the accused until a verdict has been reached," *Curley v. United States*, 81 U. S. App. D. C. 389, 393, 160 F. 2d 229 (1947).

## 2. The weight of the evidence

If upon the evidence there arises a reasonable doubt, the court is required to acquit. Appellant asserts that in this instance "the court below erred in failing to acquit defendant on grounds of insanity" (Br. 19).

There was no motion for a directed verdict of acquittal, but of course the court on its own motion could enter a judgment of acquittal, Federal Rules of Criminal Procedure, Title 18, U. S. C., Rule 29 (a). However, this raises a critical point as to the existence of a reasonable doubt, and the exercise of the trial court's discretion.

What would be a "reasonable" doubt for the purpose of acquittal, that is, how must the trial judge weigh in balance "all the evidence" to determine probative reasonableness of in-

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prove his insanity beyond a reasonable doubt. 2. He must establish it by a preponderance of evidence. 3. He must raise a reasonable doubt as to his sanity. The first of these views receives most countenance from English adjudications and textbooks; the second is supported by a majority of the American courts; while the third, though held as yet perhaps by a minority of the adjudged cases, is gaining in favor, is the well-settled law in many of the States, and is supported by a power of reasoning which we deem convincing." See *Miller, Criminal Law* 135-136 (1934).

sanity, is stated in the case of *Curley v. United States*, 81 U. S. App. D. C., at p. 392, as follows:

The critical point in this boundary is the existence or nonexistence of a reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.

Of course, an appeals court cannot substitute its judgment on the facts for that of the trial judge; it has no power to try the facts *de novo*; it can review the record for errors of law only, to determine, whether the trial judge has abused his discretion, *United States v. Johnson*, 327 U. S. 106, 109, 113, 66 S. Ct. 464, 90 L. Ed. 562 (1945); *Harrison v. United States*, 191 F. 2d 874 (5th Cir. 1951).

Thus, with reasonableness as the "yardstick," and the whole evidence as the subject of measure, there still remains the question of "relevancy" of the evidence with respect to the defense sought to be established. The question in a criminal case is not mental unsoundness, as such, that is a question for psychiatry; but whether appellant's unsoundness of mind prevented him from appreciating the nature and quality of his criminal act and to the extent that he would not be blameable therefor, *Holloway v. United States, supra*.

A review of the testimony on this issue will demonstrate that the trial court could not properly acquit, for the reason that the relevant evidence as to legal insanity did not raise a "reasonable doubt" of insanity to the extent that appellant did not understand or appreciate the nature of his criminal offense.

### 3. History of appellant's "mental diagnosis"

Appellant's mental state during a period preceding the date of the present crime is stated in appellant's brief, to have been diagnosed on September 5, 1947, to be "*Psychoneurosis; reactive depression; emotional immaturity without psychosis; psychopathic personality*," with a discharge from St. Eliza-

beths on November 25, 1947, as "*not insane \* \* \* without psychosis, psychopathic personality*" (Br. 9). Later, after another offense and commitment to St. Elizabeths, appellant was diagnosed to be suffering from "*Psychosis with Psychopathic Personality,*" on April 24, 1948, and discharged on July 22, 1949, as "*recovered from Psychosis with Psychopathic Personality*" (Br. 10). Again, Durham was recommitted to St. Elizabeths by court order, February 5, 1951, after violation of a "conditional release" from jail, and subsequently diagnosed to be "*without mental disorder, psychopathic personality,*" and was discharged May 14, 1951, as "*mentally competent*" (Br. 10).

After appellant was indicted, August 8, 1951, for the crime of burglary and larceny committed on July 13, 1951, the court ordered a psychiatric examination to determine appellant's mental competency to stand trial and Dr. Joseph L. Gilbert as a reporting alienist informed the court on October 9, 1951, as follows:

In accordance with the order of the Court to examine Monte W. Durham, a white man approximately 23 years of age, I have the honor to inform you that I examined this man September 3, and September 22, 1951 at the District of Columbia Jail.

As a result of my examinations it is my opinion that Monte W. Durham is of unsound mind, suffering from Undifferentiated Psychosis \* \* \* (J. A. 57).<sup>3</sup>

On February 12, 1953, the Acting Superintendent of St. Elizabeths Hospital, Dr. Samuel A. Silk, informed the Attorney General that Monte Durham was mentally competent to stand trial and on February 18, 1953 the Superintendent also certified to the Clerk of the District Court that appellant was mentally competent to stand trial (J. A. 61-62). However,

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<sup>3</sup> On direct examination, Dr. Gilbert testified at the trial that, "I used the diagnosis of undifferentiated psychosis, but according to the record the diagnosis was at the time of commitment psychosis with psychopathic personality" (J. A. 28). Dr. Amino Perretti examined appellant under the same court order September 2 and 23, 1951, and informed the Court: "As a result of such mental examination I conclude that this man is of Unsound Mind, suffering from a frank mental disorder or psychosis, namely Psychosis With Psychopathic Personality" (J. A. 56).

Dr. Silk informed the Attorney General on the diagnosis of appellant's mental disorder, as follows:

Prolonged psychiatric study has established that this individual suffers from *psychological* illness but is *mentally competent* to stand trial and is able to consult with counsel to properly assist in his own defense. It is considered desirable to advise you that the diagnosis established by this hospital is Sociopathic Personality Disturbance, Antisocial Reaction. One of the manifestations occasionally observed in patients with this illness is the simulation of insanity for the purpose of evading responsibility for criminal offenses. This is of particular moment since this patient is consciously reluctant to be returned for trial and it is possible that he may simulate or malingering more severe mental disorder. It would appear desirable to call this to the attention of the medical authorities of the District of Columbia Jail so that all subjective manifestations of mental aberration will be scrutinized carefully. This, of course, does not obviate the fact that he has definite mental illness but is only to emphasize that his *illness is not the type considered to amount in degree to mental unsoundness or to render him unfit for trial.* [Emphasis supplied.]

#### 4. The Record Evidence

The defense of insanity was premised primarily on the testimony of Dr. Joseph L. Gilbert, Chief Psychiatrist, Gallinger Municipal Hospital (J. A. 27-44), and secondarily, on the testimony of appellant's mother, Margaret Durham (J. A. 44-50).

##### a. Testimony of Dr. Joseph L. Gilbert

At the time of trial, Dr. Gilbert was asked if he could determine on the dates of September 3 and 22, 1951, when he examined Monte Durham to determine competence to stand trial, what the mental state of appellant was on the date of the crime, July 13, 1951, and he replied:

Yes. My examination would antedate that; that is, the symptoms obtained, according to my examinations,



included that—the symptoms of the mental disorder (J. A. 29).

During cross-examination, Dr. Gilbert specifically stated that “[i]t is my opinion he was of unsound mind” on the date of the burglary, July 13, 1951 (J. A. 29).

The basis of this medical opinion was stated to be the result of eliciting the following symptoms of mental aberration from Monte Durham himself:

A. Well, he was trying to work for a while, he stated, and while he was working at one of these People's Drug Stores he began to hear false voices and suffer from hallucinations and believed that the other employees and others in the store talked about him, watched him, and the neighbors did the same, watching him from their windows, talking about him, and those symptoms continued and were present through the time that I examined him in September and October (J. A. 29).

Dr. Gilbert, during cross-examination, was asked to explain the difference between his report of “undifferentiated psychosis” and the commitment diagnosis of “psychosis with psychopathic personality” and he replied:

A. It could have been none.

Q. What?

A. It could have been none.

Q. As far as a psychopathic personality, people are walking around the streets every day in the week, are they not, with psychopathic personality?

A. Yes, they are (J. A. 30).

The Court next inquired:

Q. A person with a psychopathic personality is legally responsible for his criminal acts, is he not? A person who is a psychopathic personality, without any psychosis, he is not insane?

A. No. Psychopathic Personality, period, means not insane (J. A. 31).

Later in the testimony, the doctor was asked to state his opinion as to whether Monte Durham was suffering from a

possible "prison psychosis" resulting from his detention, since arrest, as follows:

Q. Would you say that when you examined the defendant in September that he was not suffering from prison psychosis?

A. No, I wouldn't—no, I didn't think so.

Q. Would you say he was not?

A. Well, I said he was not—I didn't say he wasn't, but I didn't think he was.

Q. Let's see, now, we want something more definite than that.

A. That's about as close as I can come. I didn't use the term "prison psychosis"; I used the term "psychosis with psychopathic personality" which means a mental disorder occurring in an unstable person, and that did not carry with it the connotation of the development of the mental disorder in the prison after incarceration (J. A. 38).

Thus, Dr. Gilbert's opinion of appellant's "psychosis" was primarily based on the symptoms elicited from Monte Durham himself, in that they indicated a preprison environment (J. A. 39-40).

The Court, however, called to the attention of the defense counsel that matters relating to appellant's unsound mind had not thus far demonstrated a causal relation to the particular criminal act under judicial investigation (J. A. 40). Thereupon, defense counsel attempted to establish a relevancy between the criminal act and appellant's mental culpability, as follows:

Q. Doctor, directing your attention to your examination of this defendant, and your opinion that you reached, would you say that he knew the difference between right and wrong on July 13, 1951; that is, his ability to distinguish between what was right and what was wrong?

A. As I have stated before, if the question of right and wrong were propounded to him he could give you the right answer.

The COURT. No; I don't think that is the question, Doctor—not whether he could give a right answer to a question, but whether he, himself, knew the difference between right and wrong in connection with governing his own actions.

The WITNESS. Well, that's the question that arises in my mind.

The COURT. If you are unable to answer, why, you can say so; I mean, if you are unable to form an opinion.

The WITNESS. I can only answer this way: That I can't tell you how much the abnormal thinking and the abnormal experiences in the form of hallucinations and delusions—delusions of persecutions—had to do with his antisocial behavior.

I don't know how anyone can answer that question categorically, except as one's experience leads him to know that most mental cases can give you a categorical answer of right and wrong, but what influence these symptoms have on abnormal behavior or antisocial behavior——

The COURT. Well, your answer is that you are unable to form an opinion, is that it?

The WITNESS. I would say that is essentially true, for the reasons that I have given (J. A. 41).

Thus, with candor the doctor testified to an inability to evaluate the extent that appellant's abnormal thinking and abnormal experiences in the form of hallucinations and delusions—antisocial behavior—influenced appellant's understanding of his act of burglarizing on July 13, 1951.<sup>4</sup>

Defense counsel, not apparently satisfied, again propounded the specific matter in issue to the doctor, as follows:

Q. Can you give us an opinion as to whether on July 13, 1951, assuming this man was found in someone else's home, that he knew it was wrong to go into that home and he knew he was violating the law?

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<sup>4</sup>There was more than one charge of burglary against appellant, but the other two charges were dismissed after the sentence in this case (J. A. 53-54).



A. Well, I would have to let the answer with regard to right and wrong stand with reference to a specific thing, but——

The COURT. Well, you have answered the question, Doctor (J. A. 42).

With respect to the "symptomatic conditions" of appellant's mind, the Court again gave the matter thorough consideration, to determine their practical impact on appellant's mind the date the burglary took place. The Court cautiously re-examined the doctor on this matter, as follows:

Q. You examined him on September 3d, and at that time you found him to have reverted back to his unsound state?

A. Yes, Your Honor.

Q. And of course you found also, as I understand from your testimony, that that state of unsound mind began some time prior to September 1st and sometime after May 14th?

A. Yes.

Q. It was progressive, or did it arrive overnight?

A. No. *It was my opinion that it became more progressive to the point where he even fled from the community because of his symptoms* after shutting himself in the home for periods of time.\*

Q. Then is it reasonable to assume that it is not possible to determine how far this state of unsound mind had progressed by July 13th? Isn't that so?

A. As to the seriousness of the symptoms as compared with them and the time I observed him, that's true, *except that his travels were based, according to his statement to me, on certain of the symptoms and*

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\*On this statement, Government counsel cross-examined the Doctor, as follows: Q. Doctor, you just said something about him leaving the jurisdiction and fleeing and going some place.—A. At sometime or other, after his release from Saint Elizabeths Hospital. Q. Doctor, did you know at that time there was a warrant out for him, being a parole violator, and that is why he left the jurisdiction? \* \* \*—A. No; I couldn't know that. Q. Now, if that was the truth would you consider that in forming your opinion?—A. No. (J. A. 43.) See Appellant's Supp. Brief, p. 10.

*his leaving Washington, his giving up his job and work and leaving the work that he had tried to do.*

Q. But you can't tell, can you, how far those symptoms had progressed and become worse by the 13th of July?

A. No, not how far they were, that is correct.

[Emphasis supplied.]

Therefore, Dr. Gilbert's opinion that appellant was mentally unsound on this date of the crime, was in part due to certain symptoms; the sole source of these descriptive symptoms was appellant himself; and the seriousness of these symptoms as an influence upon appellant's criminal intent was not, in fact, determinable.

Appellant readily admits that the "psychiatrist could not pinpoint the extent to which the symptoms had 'progressed and become worse' by July 13," but relies upon the fact that Dr. Gilbert did not retract his testimony that "the period of insanity would have embraced the date of July 13, 1951" (Br. 17-18).

However, what weight can be given to the symptomatic behavior is questionable because the doctor premised their increasing seriousness after the date of May 14, 1951, the date of appellant's release from Saint Elizabeths Hospital as mentally competent, on the fact that appellant "even fled from the community because of his symptoms"; whereas, in fact he was fleeing a warrant for arrest as a parole violator.<sup>5</sup>

#### *b. Testimony of Margaret Durham*

The mother of Monte Durham testified to the fact that when appellant was released May 14, 1951, the "first night" home he "wanted me to have a steel door put up at the bedroom door and bars at his windows; that he saw people looking in at him and checking up on him" (J. A. 45). After that event, apparently nothing more happened for the next 14 nights, for Mrs. Durham testified he thereafter left home, "he went away

<sup>5</sup> Appellant's Supp. Brief, p. 10, states on this point: "Thereafter, he left the District in violation of the terms of his conditional release and upon hearing that a warrant had been issued for him as a parole violator, he fled the jurisdiction with a 'girl friend' traveling through the South and Midwest, obtaining money by passing a number of bad checks."

and I didn't know where he was until June 29th" (J. A. 46). Thereafter, the mother testified Monte Durham "came home on the 3rd of July and he said he was going back to Atlanta, Georgia—Augusta, Georgia, rather—the next day, and that was the 4th of July" (J. A. 47).

Government counsel next inquired:

Q. Did he go?

A. Well, he went away from home; whether he went there I don't now. When he came back the 11th and he stayed all night and he went out—it was a Thursday, I am sure the 12th, and he says, "I am going, I will be back," and I didn't hear any more from him until this happened (J. A. 47).

### *c. Summation*

Nothing in Mrs. Durham's testimony sufficiently points to the actual state of appellant's mind on July 13, 1951; and, other than the "steel door" remark of appellant on May 14, 1951, appellant's mother lacked contact with him to determine his symptomatic state of mind during this crucial period preceding the date of the crime.

Actually, all *this record* shows is that Monte Durham had been formally committed to St. Elizabeths Hospital, the exact dates, diagnosis, and conditions are not evident (J. A. 4-6, 19, 21-24); that Monte Durham was examined approximately two months after the offense only for the purpose of determining his then competence to stand trial (J. A. 27-29); that on the basis of a prison observation and Monte Durham's own description of his mental aberrations, the doctor hazarded the opinion that appellant was mentally unsound on the date of the crime but totally abstained from appraising appellant's mental state in relation to the commission of the crime.

### **5. Doubt of sanity**

It would appear from this evidence, looking at it from its entirety, that there was a psychiatric basis for appellant to be presumed mentally unsound. Whether this mental condition was such as to relieve appellant of criminal culpability is a question.

The law of this jurisdiction on that question is bottomed on the *Davis* case where on the issue on the legal test of criminal culpability, the Supreme Court, 160 U. S., at p. 485, stated:

[I]n order to constitute a crime, a person must have intelligence and capacity enough to have a criminal intent and purpose; and if his reason and mental powers are either so deficient that he has no will, no conscience, or controlling mental power, or if, through the overwhelming violence of mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent, and is not punishable for criminal acts." *Commonwealth v. Rogers*, 7 Met (Mass.) 500. Neither in the adjudged cases nor in the elementary treatises upon criminal law is there to be found any dissent from these general propositions. [Emphasis supplied.]

In the case of *Hotema v. United States*, 186 U. S. 413, 416, 22 S. Ct. 895, 46 L. Ed. 1225 (1901), cited as a "broader test" of legal insanity by this Court in *Holloway v. United States*, *supra*, (88 U. S. App. D. C. at p. 4), the Supreme Court approved the following explanatory statement on the matter, as follows:

Prior to giving specific instructions in regard to the legal meaning of the word "insanity," and as to its sufficiency as a defense to the party accused of the crime, the court made some general statements upon that subject, as follows:

"Every person, charged with crime, is presumed to be sane; that is, of sound memory and discretion, until the contrary is shown by proof. No act done in a state of insanity can be punished as an offense. *The question of the insanity of the defendant has exclusive reference to the act with which he is charged and the time of the commission of the same.* \* \* \* Whether the insanity be general or partial, whether continuous or periodical, the degree of it must have been sufficiently great to have controlled the will of the accused at the time of the commission of the act. Where reason ceases to have dominion over the mind proven to be diseased, the person

reaches a degree of insanity where criminal responsibility ceases and accountability to the law for the purpose of punishment no longer exists."

Recently, in the case of *Leland v. Oregon*, 343 U. S. 790, 796, 797, 799, 800, 72 S. Ct. 1002, 96 L. Ed. 1302 (1951), the Supreme Court again reaffirmed the legal test to be applied in the federal courts, as follows:

That was the rule announced in 1843 in the leading English decision in *M'Naughton's* case:

"The jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and—to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing——" \*

This remains the English view today.

In most of the nineteenth-century American cases, also, the defendant was required to "clearly" prove insanity, and that was probably the rule followed in most states in 1895, when *Davis v. United States* was decided. \* \* \* The decision obviously establishes no constitutional doctrine, but only the rule to be followed in federal courts.

\* \* \* \* \*

In all English-speaking courts, the accused is obliged to introduce proof if he would overcome the presumption of sanity.\*\*

\* \* \* \* \*

Knowledge of right and wrong is the exclusive test of criminal responsibility in a majority of American

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\*10 Cl. & Fin. 200, 210 (H. L., 1843).

\*\*Weihofen, *Insanity as a Defense in Criminal Law* (1933), 161; 9 Wigmore, *Evidence* (3rd Ed. 1940), § 2501.



jurisdictions. The science of psychiatry has made tremendous strides since that test was laid down in *M'Naughten's* case, but the progress of science has not reached a point where its learning would compel us to require the states to eliminate the right and wrong test from their criminal law. Moreover, choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility. This whole problem has evoked wide disagreement among those who have studied it.<sup>6</sup>

This Court, in the *Holloway* case, *supra*, at p. 3-4, also stated a distinction exists between a psychiatric fact of mental unsoundness and the judgment of the law on such fact in criminal trials, as follows:

*The ordinary test of criminal responsibility is whether defendant could tell right from wrong. A slightly broader test is whether his reason had ceased to have dominion of his mind to such an extent that his will was controlled, not by rational thought, but by mental disease. The application of these tests, however they are phrased, to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did.*

\* \* \* \* \*

\* \* \* It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas

---

<sup>6</sup> In a dissent by Justice Frankfurter, joined by Mr. Justice Black, the minority strongly urged that a state statute which required the defense of insanity to be proved "beyond a reasonable doubt" is a denial of due process of law; but the minority did not qualify the "right and wrong" doctrine, but stated:

"Behind a muscular contraction resulting in another's death there must be culpability to turn homicide into murder.

"The tests by which such culpability may be determined are varying and conflicting. \* \* \*

"That a man's act is not his, because he is devoid of that mental state which begets culpability, is so exceptional a situation that the law has a right to devise an exceptional procedure regarding it."



criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. \* \* \*

A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. [Emphasis supplied.]

Of course, this jurisdiction accepted long ago the doctrine of irresistible impulse as an additional legal test to that already accepted rule of "not only—distinguishing between right and wrong, but that he was impelled to do the act by an irresistible impulse—though knowing it to be wrong," *Smith v. United States*, 59 App. D. C. 144, 145, 36 F. 2d 548 (1929). Again, in the case of *Tatum v. United States*, 88 U. S. App. D. C., at p. 617, this Court reaffirmed the application of legal tests, i. e., "Tatum might have been legally insane and yet they [the jury] would have been required to hold him legally responsible."

The legal tests for determining the "relevancy" of the evidence as a whole, and which are used to evaluate whether there exists a "reasonable doubt" of sanity, have not been otherwise qualified or varied in this jurisdiction from the pronouncements of the Supreme Court. The Supreme Court recognized in the *Leland* case that a "disagreement" exists, but refused to alter the accepted concepts of "right and wrong" or "irresistible impulse" being other than due process, in the state or federal jurisdictions.

Therefore, in applying these principles to this case, appellant's admission that "Dr. Gilbert—was unable to state whether appellant could discern 'right from wrong' on July 13, 1951," (Br. 14) and not asserting that the irresistible impulse test has any relevancy, it logically follows that this forecloses appellant asserting that the Court was in error for not granting acquittal.

There may have been an exactitude in the correct application of the law, but that cannot be urged as an abuse of discretion. The court below actually considered this question of acquittal when it stated:

While, of course, the burden of proof on the issue of mental capacity to commit a crime is upon the government, just as it is on every other issue, nevertheless the Court finds that there is not sufficient to contradict the usual presumption of the usual inference of sanity (J. A. 50).

Thus, the Court did not believe that the defense had legally established a "reasonable doubt" as to appellant's legal culpability to understand the nature and quality of his act on July 13, 1951 by reason of an insane mind; and therefore, the prosecution was not legally deprived of its right to a presumption of sanity. The Court adequately explained its ruling, thus:

There is no testimony concerning the mental state of the defendant as of July 13, 1951, and therefore the usual presumption of sanity governs.

While if there was some testimony as to his mental state as of that date to the effect that he was incompetent on that date, the burden of proof would be on the Government to overcome it. There has been no such testimony, and the usual presumption of sanity prevails (J. A. 50).

While "testimony" and "evidence" can be considered essentially the same, *Oklahoma Gas & Electric Co. v. Bates Expanded Steel Truss Co.*, 296 F. 281, 282 (D. C. Del. 1924), in that testimony can be oral evidence, the testimony should be relevant to the evidentiary fact sought to be established. See *United States v. Luce*, 141 Fed. 385, 390 (4th Cir. 1905); *United States v. Lee Huen*, 118 Fed. 442, 456 (D. C. N. Y. 1902). Conversely, if a fact in evidence is sought to be established, the testimony must be relevant. The court in this instance recognized the testimony but stated its relevancy must be "to the effect that he was incompetent on that date [July 13, 1951]" (*ibid.*). "Legal incompetence" here comprises an inability to distinguish the nature or quality of one's

act, in the sense of its wrongness, which the appellant admits doesn't obtain in this instance. There being no defense on the ground of an "irresistible impulse," by established laws, appellant cannot be entitled to an acquittal.

In conclusion, appellant's thesis that the "evidence that a defendant can not differentiate right from wrong is not necessary to rebut the sanity presumption" (Br. 18) is not intrinsically sound. Appellant would seek support in the *Tatum* case, but that decision established only the right of an accused to have his theory of the defense presented to the jury for their consideration, i. e., "in criminal cases the defendant is entitled to have presented instructions relating to a theory of defense for which there is any foundation in the evidence, even though the evidence may be weak, insufficient, inconsistent, or of doubtful credibility" and "the complete absence of instructions by the court on the essential issue of appellant's sanity requires that the case be reversed and remanded for a new trial" (88 U. S. App. D. C., at p. 617).

It can hardly be assumed that the *Tatum* decision meant to change the law with respect to the "instructions on insanity."

In the absence of a motion for a directed verdict of acquittal in this instance, there can be no abuse of discretion urged against the trial judge because he didn't *sua sponte* misapply the law of this jurisdiction by granting acquittal. There can be no error on this point, as a matter of law. The trial court must weigh acquittal and the probative evidence does not with any certitude demand acquittal. At most, reasonable men may differ as to a reasonable inference of culpability from the fact of Monte Durham's mental abnormality, but that is a proper question for jury determination.

#### 6. The verdict

It is the province of a judge sitting without a jury to assume the function of the jury, to weigh the evidence, draw justifiable inferences of fact from proven facts, and consider the credibility of witnesses, *United States v. McCarthy*, 196 F. 2d 616, 619 (7th Cir. 1952); *Lowery v. United States*, 161 F. 2d 30, 34 (8th Cir. 1947), *cert. denied*, 331 U. S. 849; Federal Rules of Criminal Procedure, Title 18, U. S. C., Rule 23 (e).

The verdict of the trial court must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it, *Bridges v. United States*, 199 F. 2d 811 (9th Cir. 1952); *United States v. McCarthy, supra*; *McGuinn v. United States*, 191 F. 2d 477, 89 U. S. App. D. C. 197 (1951); *Carlson v. United States*, 187 F. 2d 366 (10th Cir. 1951), *cert. denied*, 341 U. S. 940, *rehearing denied*, 342 U. S. 843.

The court below made the following finding and verdict:

I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that if he did, he was subject to an irresistible impulse by reason of the derangement of mind.

\* \* \* \* \*

The court finds the defendant guilty—— (J. A. 50-51).

Of course, on appeal from the judgment of conviction, this court is not permitted to weigh the evidence, and on fact issues is concerned only with whether the "record" discloses substantial evidence to support the verdict of the court, *Ross v. United States*, 197 F. 2d 660, 664-665 (6th Cir. 1952), *cert. denied*, 344 U. S. 832.

Dr. Gilbert testified to the mental state of Monte Durham and informed the court of the character of his mental disease and degree of influence, if any, it may have had on the criminal conduct of appellant. The function of the judge sitting without a jury is to weigh the whole evidence, and the "psychiatrist's moral judgment reached on the basis of his observations is relevant," but it "cannot bind the jury except within broad limits," *Holloway v. United States, supra*.

The trial judge determined by a verdict of guilty that Monte Durham had not demonstrated that the judicial processes should morally exonerate him for his crime; and to justify a reversal of this verdict, the circumstances of the record before this court must be such that the verdict shocks the conscience of the court, *Holloway v. United States, supra*; *United States v. Gundelfinger*, 102 F. Supp. 177 (D. C. Penn. W. D., 1952).

## 7. Act and intent

An essential underlying principle that pervades this entire question of insanity, legal or otherwise, is that if a court proceeds to an inquiry as to whether an accused is sane or insane and reaches a judgment in the inquiry, it must do so on sufficient probative data.

Can it be said the three nominal contacts of Dr. Gilbert with appellant at the prison, where admittedly only conversation between them took place, approximately two months after the offense, is medically sufficient in itself? Disregarding psychiatric objectiveness in legal tests, the fact of insanity should be medically acceptable; but Dr. Gilbert had no electroencephalograms made, nor I. Q., nor Rorschach tests, nor laboratory tests of any sort to substantiate his opinion. At most, Dr. Gilbert's examination was an exceedingly limited one; he didn't take time to check hospital records on appellant's former mental diagnosis, or consult other examining psychiatrists (J. A. 32-33). See *United States v. Baldi*, 192 F. 2d 540, 565 (3rd Cir. 1951) dissenting opinion of Chief Judge Biggs (affirmed 344 U. S. 561).<sup>7</sup>

Beside a meager medical basis, the record is glaringly absent that necessary correlation of the psychotic mind to the act.

The dissenting opinion of Chief Judge Biggs, above, severely criticized the McNaughten rule, but he stated:

We can see no reason why the legal test of irresponsibility for the commission of a crime should not be based upon the principle that if the mental illness of the accused is the proximate, or a contributory, cause of the crime, then the accused may not be found guilty of murder (*id.* at p. 568).

Appellants' cited recommendations for a new test of insanity (Br. 26-29) do not disassociate the mental state of a criminal from his resultant crime except the recommendation of the Forensic Committee of the Group for the Advancement of Psychiatry (Br. 28-29). Thus, the Report of the Royal Commission recommends:

<sup>7</sup> The dissenting opinion stated, at p. 565: "Weihofen, 'Criminal Insanity,' 48 Michigan Law Review, 961, at p. 975, states that the psychiatrist who, weeks or months after the crime, is called upon to determine the condition of the accused 'is given a Herculean task.'"



The jury must be satisfied that *at the time of committing the act*, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the *act* or (b) did not know that it was wrong or (c) was incapable of preventing himself from committing it (Aplt. Br. 27).

The cited German Criminal Code provides that an act is not a criminal offense if "the actor at the time of the commission of the act," etc.; and the Swiss Penal Code states, "incapable of appreciating the unlawful nature of his act"; and the Manual for Courts Martial United States provides "concerning the particular act"; and finally, the cited New Hampshire test, "[t]hey are clearly matters of evidence to be weighed by the jury upon the question whether the act was the offspring of insanity; if it was, a criminal intent did not produce it" (Aplt. Br. 27-28).

Whether, the legal tests presently applicable in this jurisdiction, or appellants' recommended tests, the application "of these tests, however they are phrased, to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did," *Holloway v. United States, supra*. The only way to recognize "blame" is with respect to the particular criminal offense. One may be, or may become of unsound mind, as appellant may incline, or be otherwise defective and in need of hospitalization and medical treatment, and still have had sufficient mentality to be blamable for his criminal act, *Garcia v. Steele*, 193 F. 2d 276 (8th Cir. 1951).

Therefore, it is manifestly clear that the trial court rendered the proper judgment in this case.

#### CONCLUSION

For the reasons assigned therefor, it is respectfully submitted that the judgment of the lower court should be affirmed.

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**SUPPLEMENTAL BRIEF FOR APPELLANT ON  
REARGUMENT**

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IN THE  
**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 11,859**

MONTE W. DURHAM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

Appeal from the United States District Court for the  
District of Columbia

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IN THE

**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11,859

---

MONTE W. DURHAM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

---

Appeal from the United States District Court for the  
District of Columbia

---

**SUPPLEMENTAL BRIEF FOR APPELLANT ON  
REARGUMENT**

---

**STATEMENT OF THE CASE**

This is an appeal by Monte W. Durham from a verdict and judgment entered on May 25, 1953, by the United States District Court for the District of Columbia (Holtzoff, J.). Trial by jury was waived (JA 8).

Defendant-Appellant was indicted with three others on August 8, 1951, for housebreaking and grand larceny<sup>1</sup> (JA 54). On October 16, 1951, after pre-trial proceedings and psychiatric examination pursuant to 18 U.S.C. § 4244, Appellant was adjudged "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense", and he was remanded to the custody of the Attorney General "until competent to stand trial, or until the pending charges against him are disposed according to law" (JA 60). Appellant was thereafter committed to Saint Elizabeths Hospital (JA 4).

On February 18, 1953, the Attorney General was advised by Dr. Samuel A. Silk, Acting Superintendent at Saint Elizabeths, that Appellant is "mentally competent to stand trial and is able to consult with counsel to properly assist in his own defense" (JA 61). Appellant was accordingly brought to trial on March 19, 1953 (JA 3). Testimony by police officers that they apprehended Appellant about 3:30 A.M. on July 13, 1951, in the home of Donald Hiss, 3030 Q Street, Washington, D. C., was not challenged (JA 9-16). Appellant's counsel below "admit[ted] that he is now of sound mind" but interposed the defense that Appellant was of "unsound mind at the time he committed the offense" (JA 7, 8). Appellant was found guilty of housebreaking and petit larceny<sup>2</sup> (JA 51), the Court below ruling that

"I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind.

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<sup>1</sup> The indictment was predicated on violation of District of Columbia Code, §§ 22-1801, 22-2201, and 22-2202 (D. of C. Code, 1951 Ed.). (JA 54). A motion by the Government severing the case against Durham from that against the other defendants was granted on October 30, 1951 (JA 60). The case against the other defendants "has been disposed of" (JA 4, 54).

<sup>2</sup> The grand larceny charge in the indictment was reduced by consent of Appellee to petit larceny (JA 17).

"While, of course, the burden of proof on the issue of mental capacity to commit a crime is upon the government, just as it is on every other issue, nevertheless the Court finds that there is not sufficient [evidence] to contradict the usual presumption or [sic] the usual inference of sanity.

"There is no testimony concerning the mental state of the defendant as of July 13, 1951 [the date of the crime] and therefore the usual presumption of sanity governs" (JA 50).

On May 25, 1953, Appellant was sentenced to a term of three to ten years imprisonment (JA 73). This appeal duly followed.

### **STATUTES INVOLVED**

The pertinent statutes are set out in the Brief for Appellee, pp. 9-11.

### **STATEMENT OF POINTS**

1. The Court below erred in ruling that there was no testimony concerning the mental state of the Appellant as of July 13, 1951, the date on which the crime was committed.

2. The Court below erred in ruling that the evidence presented was insufficient to overcome the presumption of sanity.

3. The Court below erred in failing to conclude that there was a reasonable doubt that Appellant was of sound mind at the time the crime was committed and therefore not guilty by reason of insanity.

4. The "right and wrong" test is an inappropriate, inadequate, and unjust criterion for determining criminal responsibility.

### **SUMMARY OF ARGUMENT**

The sole issue argued in this Brief is whether Appellant was criminally responsible at the time of the commission of

the crime. The record reflects an extensive pre-offense psychiatric history, including three admissions to Saint Elizabeths Hospital in the four years preceding the offense and two determinations of insanity during this period by courts of this jurisdiction. Appellant was adjudicated to be mentally incompetent both shortly before and shortly after the offense. An experienced psychiatrist testified that in his opinion Appellant was of unsound mind on the critical date. No other psychiatrist testified.

The trial court erred in ruling (1) that this evidence was insufficient to overcome the presumption of sanity and (2) in failing to conclude that there was reasonable doubt as to Appellant's sanity. Apparently, the trial court's conclusion was based upon the fact that the psychiatrist declined expressly to state that the Appellant could not distinguish right from wrong as of the date of the alleged crime. But proof of such incapacity is unnecessary either to overcome the presumption or to create a reasonable doubt concerning sanity. There was ample affirmative evidence for both propositions.

The "right and wrong" test is an inappropriate, inadequate, and unjust yardstick for ascertaining criminal responsibility. It is incompatible with current knowledge of psychiatry and criminology. Literally applied, the test would blot out the insanity defense since nearly all insane persons know that their acts are wrong and contrary to law. A test of criminal responsibility should focus not on intellectual capacity to discern right from wrong but upon the total competence of the accused, both rational and emotional, to regulate his conduct in accordance with the norms of society.

## **ARGUMENT**

### **Preliminary Statement**

This appeal raises important questions respecting judicial administration of the insanity defense in criminal proceedings. These questions are, first, the nature of the evidence required to overcome the presumption of sanity; and, sec-

ond, assuming that the presumption has been overcome, the nature of the evidence necessary to support a finding of sanity.

On this appeal we present solely the question whether, on this record, Appellant was criminally responsible at the time of the commission of the crime: July 13, 1951. We do not believe that on this record we are at liberty to raise the question of Appellant's sanity as of the date of trial. Counsel for Appellant below conceded that Durham was mentally competent to stand trial (JA 7-8),<sup>3</sup> and we do not challenge the effectiveness of counsel's admission.

The Court below recognized the accepted rules that defendants are presumed to be sane and that if evidence is adduced rebutting the presumption, the burden is upon the Government to prove sanity beyond a reasonable doubt. The Court held, however, that "there is no testimony" or that "there is not sufficient [evidence]" concerning the mental state of the Appellant at the time of the alleged crime to overcome the presumption of sanity. For this reason the Court ruled that the Appellant was sane and therefore criminally responsible. It appears clear that the Court would have been unable on this record so to hold except on the basis of the presumption of sanity.

The principal evidence in the record concerning Appellant's sanity is the testimony of Dr. Joseph L. Gilbert, Chief Psychiatrist at Gallinger Hospital for twenty-two years. He testified that in his opinion Appellant was "of

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<sup>3</sup> The hospital authorities had certified that Appellant was competent to stand trial (JA 61). Counsel for Appellant below stated, "I will admit that he is now of sound mind. . . In the interest of saving time and secondly because I feel confident that my medical testimony will support my contention [that he was of unsound mind at the time he committed the offense] I am willing to agree that he is of sound mind in order that we may proceed" (JA 7-8). The Court below accepted the waiver (JA 7-8). The effectiveness of the waiver is challenged in the Brief for Appellant, p. 18, and the Reply Brief for Appellant, p. 5, submitted in behalf of Appellant by Mason B. Leming, Esq. Whether a trial court may proceed in a criminal case absent a waiver, where a defendant previously has been adjudicated insane, without a preliminary hearing to determine if sanity has been restored is an issue now pending before this Court. *Gunther v. United States*, No. 11,970.



unsound mind" on the date of the crime, p. 13, *infra*. Dr. Gilbert's testimony and other evidence of similar purport in the record was rejected by Judge Holtzoff. The rejection of this testimony can be explained only by the fact that Dr. Gilbert declined, in response to a question asked of him by the Court, to state whether in his opinion Appellant could distinguish right from wrong at the time the crime was committed. He stated that he was "unable to form an opinion" respecting this question or upon the extent to which "hallucinations and delusions" influenced Appellant's anti-social behavior. Dr. Gilbert testified that "most mental cases" can answer right and wrong questions and that Appellant could likewise give the right answers to such questions, even though, in Dr. Gilbert's opinion, Appellant was "of unsound mind". It is the rejection of Dr. Gilbert's testimony that presents the basic legal issue on this appeal.

Judge Holtzoff's ruling that there was "not sufficient [evidence] to overcome the usual presumption of sanity" was made notwithstanding:

- (1) Uncontradicted testimony (hereinafter described) by an experienced psychiatrist that Appellant was "of unsound mind" on the date of the crime.
- (2) Evidence that Appellant had been a patient in Saint Elizabeths Hospital for psychiatric treatment *three* times before the offense and that he spent twenty of the forty-six months preceding the crime in Saint Elizabeths.
- (3) Evidence that Appellant had been adjudicated to be of unsound mind by the District Court (a) six months *before* the offense and (b) three months *after* the offense in pre-trial proceedings in this very case.
- (4) Corroborated testimony of hallucinations antedating the crime by only a few weeks.

In sum, the Court below totally rejected an extraordinary mass of evidence respecting Appellant's mental capacity to commit the crime. Its conclusion is explicable only on the hypothesis that it deemed testimony that Appellant was incapable of distinguishing right from wrong essential to overcome the presumption of sanity and indispensable to a conclusion that Appellant was not criminally responsible.

## I

### Appellant's Background

The Appellant, Monte Wayne Durham, was twenty-two years old as of the date of the crime, twenty-four at the time of trial (JA 47). The Court below had before it facts showing a remarkably extensive psychiatric history. Appellant is an emotionally disordered individual who has been entangled with legal authorities since he was fifteen years of age, and who for nearly six years has shuttled between courthouse, jail, and mental institution. He was first admitted to Saint Elizabeths Hospital on September 5, 1947, at the age of 18. In the 46 months between that time and the date of the crime (July 13, 1951), Durham spent more than twenty months in Saint Elizabeths.

#### (a) Family and Early Background

Monte Wayne Durham was born and raised in Georgetown, where his family has resided for twenty-seven years (JA 45, 48). He is the youngest of three sons (JA 48). His father, employed by the Civil Aeronautics Authority, travels and is seldom at home (JA 48). Except for close ties with his mother, his relationship with his family has been characterized as "extremely poor".\*

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\* Because we hereinafter urge the Court to consider the broader question of the adequacy and appropriateness of the "right and wrong" test, we have supplemented the facts of record with background material concerning Appellant derived from an examination of Appellant's file at Saint Elizabeths Hospital. The inspection was made with Appellant's consent. All of the facts essential to a decision on the insanity issue were before the trial court, as is indicated by our citations to the record. Cf. Fed. R. Crim. p. 52(b).

His mother testified that "up until about 13 he was a model boy" (JA 48) and that "the neighbors all liked him very much" (JA 45). When he was twelve years old, he became ill from rheumatic fever and, according to his mother, his personality thereafter underwent a change. He became embroiled in difficulties with his school teachers and when he was fifteen he left school. He has the equivalent of about a ninth grade education (JA 30).

In 1943, Durham, then fifteen, enlisted in the Army by misrepresenting his age. He was discharged when his age was discovered. When he was sixteen he enlisted in the Navy. He was discharged in 1945 after a psychiatric examination by Navy physicians, who concluded that

"this patient suffers from a profound personality disorder which renders him unfit for Naval service."

Durham was married in 1946. The marriage was unsuccessful and he and his wife are separated. He has a child who is cared for by his wife.

His work record is irregular; he has never remained on a job for more than a few months.

#### **(b) Pre-Offense Criminal and Psychiatric Record**

On May 19, 1947, Durham, then eighteen, was indicted in the District Court for violating the National Motor Vehicle Theft Act, 18 U.S.C. § 407. He pleaded guilty and on May 23, 1947, he was placed on 1 to 3 years probation by Judge Schweinhaut (D. of C. Crim. Case No. 502-47).

1. In August 1947, Durham attempted to commit suicide by turning on the gas of a stove.<sup>4</sup> He was timely discovered, taken to Gallinger Hospital for mental observation

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<sup>4</sup> According to Saint Elizabeths psychiatrists, Durham told them that the suicidal attempt "had been deliberately fabricated in an effort to get more attention and to change the attitude of his wife and mother toward him" (Supp. JA 7).

and, on September 5, 1947, he was transferred to Saint Elizabeths (Supp. JA 7).<sup>5</sup>

He was diagnosed upon admission at Saint Elizabeths as follows: "Psychoneurosis; reactive depression; emotional immaturity without psychosis; psychopathic personality". A Rorschach examination disclosed no psychosis but indicated that Durham had "considerable dysphoria, emotional instability, and impulsive behavior." A psychometric examination showed Durham to have an I.Q. of 85. On November 25, 1947, Durham was discharged from Saint Elizabeths as "not insane \* \* \* without Psychosis, Psychopathic Personality" (Supp. JA 7).

Following his discharge from Saint Elizabeths in November 1947, Durham "made a few half-hearted attempts to obtain work (Supp. JA 7). On January 17, 1948, while still on probation for the stolen automobile offense, *supra*, he was convicted in the District of Columbia Municipal Court on a charge of passing bad checks, and he was sentenced to 360 days imprisonment (D. of C. Mun. Ct. Case No. 460, 426). The Municipal Court conviction constituted a violation of the terms of probation. On March 25, 1948, the probation was revoked by the District Court (Schweinhaut, J.) and Durham was sentenced to one to three years imprisonment (D. of C. Crim. Case No. 502-47).

A few days after being placed in jail "he became boisterous and threatening and made several alleged 'suicidal attempts' " (Supp. JA 7). Thereafter, on April 21, 1948, he was found to be of unsound mind by a jury in the Municipal Court (McMahan, J.) and he was committed to Saint Elizabeths (Mun. Ct. Case No. 460, 426; Supp. JA 7).

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<sup>5</sup> The citation refers to the "Return and Answer to [Appellant's] Petition of Habeas Corpus", dated November 5, 1952, by Dr. Winfred Overholser, Superintendent at Saint Elizabeths Hospital. Some of the particulars hereinafter set forth are derived from this document which was excluded from evidence by the Court below (JA 25). Even if properly excluded from evidence, the Court could have taken judicial notice of its own records. See *Ex Parte Farrell*, 189 F. 2d 540, 545 (1st Cir. 1951); *Fletcher v. Evening Star Newspaper Co.*, 133 F. 2d 395 (D. C. Cir. 1947).

2. Upon being admitted to the hospital on April 24, 1948, Durham was diagnosed to be suffering from "Psychosis with Psychopathic Personality". He attended group therapy sessions and received individual psychotherapy.<sup>6</sup> After receiving treatment at Saint Elizabeths for fifteen months, Durham was discharged on July 22, 1949, as "recovered from Psychosis with Psychopathic Personality" (Supp. JA 7). He was thereupon returned to the District Jail to serve the balance of his sentence on the stolen automobile charge (Supp. JA 7). He was conditionally discharged on June 30, 1950 (Ibid). Thereafter, he left the District in violation of the terms of his conditional release and "upon hearing that a warrant had been issued for him as a parole violator, he fled the jurisdiction with a 'girl friend' traveling through the South and Midwest, obtaining money by passing a number of bad checks" (Ibid). Durham was arrested in Ohio and returned to the District (Ibid).

Durham was brought before the Parole Board on charge of violating his good time release, and he was referred by the Board to the District Court for a lunacy inquisition. On January 30, 1951, he was found to be of unsound mind by a jury in the District Court (Letts, J.; Crim. Case No. 502-47).

3. Durham was readmitted to Saint Elizabeths pursuant to Court order on February 5, 1951 (Supp. JA 7). He was subsequently provisionally diagnosed to be "without mental disorder, psychopathic personality". He remained at Saint Elizabeths until May 14, 1951, about three months before the crime involved in the present case, when he was discharged into the custody of his mother as mentally competent (Supp. JA 7, JA 45). Durham's mother testified below (JA 45) that

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<sup>6</sup> During his commitment pending the trial here under review, Durham received shock treatments, i.e., subshock insulin therapy (JA 22).



"the very first day, the very first night he was home he wanted me to have a steel door put up at the bedroom door and bars at his windows; that he saw people looking at him and checking up on him, and he didn't want that, and said 'Mother, if you don't do it I'm going to ask the janitor if he won't have it done for me.

"Q. Approximately when was that?

"A. That was the very first day he came from the hospital on the 14th of May."

She testified that between May and July 1951, Durham "just couldn't adjust himself", that he "seemed afraid of people" and want[ed] to be closed up in his room, locked up in his room so they couldn't check on him." (JA 46). During this period Durham tried "to work for a while" (JA 29). He took a job at People's Drug Store, but, according to the psychiatrists' testimony,

"he began to hear false voices and suffer from hallucinations and believed that the other employees and others in the store talked about him, watched him, and the neighbors did the same, watching from their windows, talking about him and these symptoms continued and were present through the time that I [Dr. Gilbert, a psychiatrist] examined him in September and October" (JA 29).

In June Durham went to Atlanta, Georgia, without telling his mother (JA 46). He returned in early July, stayed home for a night, and then disappeared for about a week (JA 47). On July 11 he returned home (JA 47) and his mother next learned of his whereabouts from the police after his arrest for the present offense two nights later (Ibid).

In summary, before the offense, Appellant had been admitted to Saint Elizabeths Hospital three times. Two of these admissions followed adjudications of insanity. He had received treatment at the hospital including thirty hours of individual psychotherapy and group therapy.



Following his adjudication of unsound mind after the present indictment, he was admitted to the hospital for the fourth time, and received subshock insulin therapy. The psychiatric diagnoses are not uniform, but the record clearly indicates a profound personality disorder, whatever may be the precise technical description. Even without the benefit of the foregoing specific psychiatric data, the Court below repeatedly was alerted to Durham's background.

**(c) The Expert Testimony**

The only psychiatric testimony at the trial was that of Dr. Joseph L. Gilbert, chief psychiatrist at Gallinger Municipal Hospital for 22 years (JA 27). He testified flatly that Durham was of unsound mind on the date of the offense.

Dr. Gilbert examined Durham in connection with the pre-trial lunacy inquisition in this case on September 3, 1951, less than two months after the offense, and again on September 22 and on October 13, 1951 (JA 28, 57). On October 9, 1951, Dr. Gilbert submitted an affidavit to the Court below (Bastian, J.) deposing that "it is my opinion that Monte W. Durham is of unsound mind, suffering from undifferentiated psychosis" (JA 57, 33). Dr. Amino Perretti, a psychiatrist, also examined Durham pursuant to request of the Court in connection with the pre-trial inquisition. On September 2 and September 23, 1951, he submitted an affidavit stating that Durham "is of unsound mind suffering from a mental disorder or psychosis, namely Psychosis with Psychopathic Personality" (JA 56). Relying on these affidavits, the Court below (Laws, J.) ordered Durham committed until competent to stand trial (JA 60).

Dr. Gilbert was asked at the trial whether at the time of his examination in September 1951, it was possible "to make a determination as to how long" Durham had been suffering from a psychosis (JA 28) and he testified that

"I felt at the time that he had been in that attitude or mental disorder for a period of some few to several months" (JA 28).

Asked to "direct his attention specifically to July 13, 1951," the date of the offense, Dr. Gilbert stated (JA 28-29):

"From my previous testimony and previous opinion, to repeat, it was my opinion that he had been of unsound mind for sometime not long after a previous release from Saint Elizabeths Hospital [on May 14, 1951].

\* \* \*

*"Q. In any event Doctor, is it your opinion that that period of insanity would have embraced the date July 13, 1951?"*

*"A. Yes. My examination would antedate that; that is, the symptoms obtained according to my examinations, included that [i.e., July 13, 1951] the symptoms of the mental disorder." (JA 29).*

On cross-examination, Dr. Gilbert twice reiterated his opinion that Durham was of "unsound mind" on the critical date:

*"Q. You were asked the specific question, Doctor, whether or not in your opinion on July 13, 1951, this defendant was of unsound mind and didn't know the difference between right and wrong. Can you express an opinion as to that?"*

*"A. Yes. It is my opinion he was of unsound mind." (JA 29).*

Subsequently Dr. Gilbert was asked again:

*"Q. Can you tell us—this is for my own information I would like to know this—you say that this defendant, at the time you examined him in [September] 1951 was of unsound mind and had been of unsound mind, sometime prior to that; is that your statement?"*

*"A. Yes, sir.*

*"Q. Can you tell us how long prior to that time he was of unsound mind?"*

*"A. Well, while he was working in People's Drug Store the symptoms were present and how long before that, I didn't get the date of that."*

*"When was he working in People's Drug Store?"*

*"A. Did you say where?"*

*"Q. When?"*

*"A. Sometime after his discharge from Saint Elizabeths Hospital."*

*"Q. In 1947?"*

*"A. Oh, no; 1951." (A 34).*

Dr. Gilbert testified that after leaving St. Elizabeths in May, Durham

*"tri[ed] to work for a while \* \* \* and while he was working at one of these People's Drug Stores he began to hear false voices and suffer hallucinations and believed that the other employees, others in the store talked about him, watched him, and the neighbors did the same, watching from their windows, talking about him and these symptoms continued and were present through the time that I examined him in September and October." (JA 29; see also JA 34, 39, 45).*

Dr. Gilbert, however, was unable to state whether Appellant could discern "right from wrong" on July 13, 1951. He was asked (JA 41):

*"Q. Doctor, directing your attention to your examination of the defendant, and your opinion that you reached, would you say that he knew the difference between right and wrong on July 13, 1951; that is, his ability to distinguish between what was right and what was wrong?"*

*"A. As I have stated before, if the question of the right and wrong were propounded to him he could give you the right answer."*

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<sup>7</sup> Durham was discharged from Saint Elizabeths on May 14, 1951 and was employed briefly thereafter, before the offense, at People's Drug Store (JA 29).

"The Court: No, I don't think that is the question, Doctor—not whether he could give a right answer to a question, but whether he himself knew the difference between right and wrong in connection with governing his own actions. \* \* \* If you are unable to answer, why, you can say so; I mean, if you are unable to form an opinion.

"The Witness: I can only answer this way: That I can't tell how much the abnormal thinking and the abnormal experiences in the form of hallucinations and delusions—delusions of persecution—had to do with his anti-social behavior. I don't know how anyone can answer that question categorically, except as one's experience leads him to know that most mental cases can give you a categorical answer of right and wrong, but what influence these symptoms have on abnormal behavior or anti-social behavior—

"The Court: Well, your answer is that you are unable to form an opinion is that it?

"The Witness: I would say that is essentially true, for the reasons that I have given.

## II

### **The Evidence Overcame the Presumption of Sanity**

The presumption of sanity was overcome by the foregoing evidence. "Presumptions may be invoked to impel a conclusion in the absence of evidence to the contrary but when such evidence appears the presumption ends." *Cornett-Lewis Coal Co. v. Commissioner*, 141 F. 2d 1000, 1004 (6th Cir. 1944); *Harlem Taxicab Ass'n. v. Nemesh*, 191 F. 2d 459, 461 (D. C. Cir. 1951). In other words, where unimpeached witnesses testify distinctly and positively to a fact and are not contradicted their testimony should under ordinary circumstances be credited and have the effect of overcoming presumptions.

Here there was no conflicting psychiatric testimony (compare *Holloway v. United States*, 148 F. 2d 665, 666 (D.C. Cir. 1945)) nor was the expert testimony contradicted by lay associates and acquaintances. Cf. *Commonwealth v.*

*Carluccetti*, 369 Pa. 190, 85 A. 2d 391 (1952). This is not a case where "there was the merest shadow of evidence that the defendant was not of sound mind." *Battle v. United States*, 209 U. S. 36 (1908). The evidence that Appellant was of unsound mind was credible and substantial.

In these circumstances, we must surmise that the trial court concluded that the presumption of sanity was not overcome either because:

- (1) The testimony of Dr. Gilbert and Appellant's mother together with the record of Appellant's treatment at Saint Elizabeths was diluted by countervailing evidence; or
- (2) Evidence that a Defendant cannot distinguish right from wrong is essential as a matter of law to rebut the presumption of sanity, and there was no such testimony in this case.

Neither of these hypotheses can justify the trial court's conclusion.

1. There were only two items which might be considered as conflicting evidence: (a) the certificate of the acting superintendent at Saint Elizabeths dated February 18, 1953, stating that Durham was competent to stand trial (JA 61), and (b) Durham's release from Saint Elizabeths on May 14, 1951, two months before the offense.

The certificate stated that "prolonged psychiatric study has established that this individual suffers from psychological illness" and that "has had definite mental illness" but that it "is possible that he may simulate or malingere more severe mental disorder \* \* \* for the purpose of evading responsibility for criminal offenses" (JA 61). However, Dr. Gilbert, on cross-examination, testified to the opinion that Durham was *not* "malinger to avoid appearing in court or going to trial \* \* \*" (JA 32).<sup>8</sup>

<sup>8</sup> The prosecution called no psychiatrist to testify that Durham simulated mental illness or was a malingerer, so that testimonial evidence and opportunity to cross examine were not present.

The Court may have relied more heavily on Durham's discharge from Saint Elizabeths on May 14, two months before the offense. "We have to assume," Judge Holtzoff stated, "that Saint Elizabeths would not release a person of unsound mind" (JA 42). He recognized, however, that Saint Elizabeths "might make a mistake; anybody can make a mistake" (Ibid.) Durham's record of two prior discharges from Saint Elizabeths followed shortly by readmission should have red-flagged the possibility that the May 14 discharge was by no means inconsistent with continued or recurrent manifestations of Durham's mental illness. This hypothesis was fortified by Durham's mother who testified that the "very first day, the very first night he was home [after the May 14 release] he wanted to have a steel door put up at the bedroom door and bars at his window" (JA 45). Further, the Court's assumption was at variance with Dr. Gilbert's explicit testimony that Durham was of "unsound mind" on July 13, p. 13, *supra*.

Finally, the Court may have been misled by its own colloquy with Dr. Gilbert. The Court had asked (JA 43):

"Is it reasonable to assume that it is not possible to determine how far this state of unsound mind had progressed by July 13th?"

"A. [Dr. Gilbert] As to the seriousness of the symptoms as compared with them and the time I observed them, that's true, except that his travels [to Georgia, p. 11, *supra*] were based, according to his statement to me, on certain of the symptoms and his leaving Washington, his giving up his job and leaving the work that he had tried to do.

"Q. [The Court] But you can't tell can you, how far these symptoms had progressed and become worse by the 13th of July?"

"A. No, not how far they were, that is correct."

In other words, the psychiatrist could not pinpoint the extent to which the symptoms had "progressed and become worse" by July 13, but he in no way retracted his testimony



that "the period of insanity would have embraced the date of July 13, 1951," p. 13 *supra*.

2. Evidence that a defendant can not differentiate right from wrong is not necessary to rebut the sanity presumption. In *Tatum v. United States*, 190 F. 2d 612 (D. C. Cir. 1951), this Court held

"that the issue of Appellant's sanity at the time the offense was committed was sufficiently raised by the testimony"

to require submission to the jury (*Id.* at 616). The testimony consisted of (1) the statement of a deputy coroner that the Appellant at the time of examination appeared to be in a "trance"; (2) the statement of an arresting officer that Appellant "didn't act normal in my estimation"; and (3) the testimony of another officer that Appellant appeared "abnormal" (*Ibid.*). Two psychiatrists testified that Appellant was of unsound mind. (*Id.* at 617). There was no testimony that Appellant could not distinguish right from wrong. Nonetheless, failure to submit the insanity defense to the jury was held to be reversible error.

We submit that substantial, competent clinical evidence of a severe mental disorder is sufficient to overcome the sanity presumption, notwithstanding the absence of any testimony respecting Appellant's capacity to differentiate right from wrong. Such evidence fulfills the Defendant's duty to go forward; it dispels the presumption of sanity and imposes upon the Government the duty to prove beyond reasonable doubt that the Defendant was mentally competent.<sup>9</sup>

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<sup>9</sup> Note should also be taken of the doctrine that insanity, once proved, is presumed to continue until the contrary is shown. *In Re Kehler*, 159 Fed. 55, 57 (2nd Cir. 1908); *Barry v. White*, 64 F. 2d 707, 709 (D.C. Cir. 1933). The two adjudications of insanity before the crime constituted *prima facie*, though not conclusive, evidence that Durham was not criminally responsible on July 13, 1951. *National Life Insurance Co. v. Jayne*, 132 F. 2d 358, 361 (10th Cir. 1942); *People ex rel Wiseman v. Nierstheimer*, 401 Ill. 260, 81 N.E. 2d 900 (1948). Moreover, "an adjudication of insanity \* \* \* substitutes for

## III

**The Defendant Was Entitled to Acquittal by Reason of Insanity**

We believe that, on this record, the Court below erred in failing to acquit Defendant on grounds of insanity. If this case had been tried before a jury it would have been error to submit it to the jury. A directed verdict would have been required because the evidence relating to sanity was not sufficient to support a conviction. Similarly, it was erroneous for the trial judge to weigh the "evidence" and to enter a judgment of guilty. The law is plain: "If the whole evidence, including that supplied by the presumption of sanity does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged." *Davis v. United States*, 160 U.S. 469, 488 (1895); *Tatum v. United States*, 190 F. 2d 612, 615 (D.C. Cir. 1951).<sup>10</sup> This record does not contain substantial evidence upon which to predicate a finding of sanity "beyond reasonable doubt."

Viewed most favorably, the only material in the record which could possibly support the thesis of sanity consisted of (1) the discharge from Saint Elizabeths on May 14; and (2) the intimation in the Certificate of Discharge, p. 16 *supra*, that Appellant may be a malingerer. Neither of these is of substantial evidentiary character, even if we assume that they are entitled to any consideration at all pp.

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the presumption of sanity a presumption of insanity which continues until the contrary is shown." *Deposit Guaranty Bank & Trust Co. v. United States*, 48 F. Supp. 369, 371 (S.D. Miss. 1943). Since the Government produced no affirmative evidence respecting Appellant's sanity, the presumption of insanity was not overturned.

<sup>10</sup> "In a criminal trial where insanity is put in issue, the burden is on the accused to overcome the presumption of sanity by evidence sufficient to create a reasonable doubt as to his mental capacity to commit the offense. When that is done, the burden is on the prosecution to establish the sanity of the accused. In such a situation the jury must be instructed that in order to convict they must believe beyond a reasonable doubt that the defendant was sane at the time of the offense." *Holloway v. United States*, 148 F. 2d 665, 666 (D.C. Cir., 1945).

16-17 *supra*. The court below decided the case as if the foregoing was the only evidence bearing on the Appellant's sanity. But there was, we believe, compelling evidence indicating insanity, namely (1) the explicit testimony of an experienced psychiatrist that Appellant was not of sound mind on the date of the offense; (2) an adjudication of insanity shortly before and shortly after the offense; (3) an extensive pre-offense psychiatric history to which the trial Court was repeatedly alerted; (4) corroborated testimony of hallucinations at the time of the offense. We maintain that on this record, at the very least, the "hypothesis of insanity" was not excluded "beyond reasonable doubt." And if there is "reasonable doubt of Defendant's sanity there must be an acquittal." *Tatum v. United States*, 190 F. 2d 612, 616 (D.C. Cir. 1951). Accordingly, we submit that the judgment below should be reversed.

#### IV

##### **The Insanity Test Should Be Revised**

The record poses a broader issue of fundamental significance: Does the oft-challenged "right and wrong" test (the M'Naghten rule) furnish an appropriate, adequate, and just standard for determining whether the mental state of the accused at the time of the offense was such that he should be held criminally responsible? The rising tide of criticism of the judge-made M'Naghten rule by respected judges, note 12 *infra*, suggests that the time is ripe for reconsideration by this Court of a doctrine long and vigorously challenged by psychiatrists and criminologists.

##### **(a) The "Right and Wrong" Test Is Obsolete and Inadequate**

The right and wrong test is derived from an opinion rendered by the House of Lords in 1843 in *Daniel M'Naghten's* case, 10 Cl. & Fin. 200 (H.L. 1843):

“[T]o establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did not know what he was doing wrong.”<sup>11</sup>

The M’Naghten test reflected the morality and psychology of early Victorian England. Law was conceived to be a system of rewards and punishment; men who voluntarily chose good were to be rewarded, men who chose evil were to be punished. “Historically our substantive criminal law is based upon a theory of punishing the vicious will. It postulates a free agent confronted with a choice between doing right and doing wrong and choosing freely to do wrong.” Pound, *Introduction to Sayre, Cases on Criminal Law* (1927); see also *Movissette v. United States*, 342 U.S. 246 (1952); Morris R. Cohen, *Moral Aspects of the Criminal Law*, 49 Yale L. J. 987, 1007 (1940). The M’Naghten test moreover presumed, in the intellectual tradition derived from Aristotle and Plato, that there was a sharp dichotomy between intellect and emotion. It assumed, consistently with the functional psychology prevalent in nineteenth century England, that

“there is a separate little man in the top of one’s head called reason whose function it is to guide another unruly little man called instinct, emotion, or impulse in the way he should go.” *Holloway v. United States*, 148 F. 2d 665, 667 (D.C. Cir., 1945).

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<sup>11</sup> The “right and wrong” rule is “the exclusive test of criminal responsibility in a majority of American jurisdictions”, *Leland v. State of Oregon*, 343 U.S. 790, 800 (1952), although in an increasing number of states a defendant may be held not criminally responsible given proof of an “irresistible impulse”. See Keedy, *Irresistible Impulse as a Defense in Criminal Law*, 100 U. of Pa. L. Rev. 956 (1952). Both the “right and wrong” and “irresistible impulse” tests are followed in this jurisdiction. *Gonzales v. United States*, 40 App. D.C. 450, 458 (1913); *Smith v. United States*, 36 F. 2d 548 (D.C. Cir. 1929); *Holloway v. United States*, 148 F. 2d 665 (D.C. Cir. 1945).

In the hundred years since the M'Naghten rule was promulgated, the discoveries of Freud and his successors have revolutionized our understanding of the nature of man. Reason is not the only regulator or determinant of conduct. Unconscious as well as conscious drives have been shown to be a determinant of conduct. The personality is an integrated entity. It cannot be divided into a compartment labelled "reason" and another compartment labelled "emotion". It has been demonstrated that "people are actuated by various compulsions to do things they themselves regard as wrong in the most shameful sense." Menninger, *The Human Mind*, 450 (1937 ed.). In short, modern psychiatry has shown that the M'Naghten test

"overemphasizes the importance of the intellect, reason and common sense; on the other hand it underemphasizes the emotional pressures that energize behavior. Actually, under the psychic effort to rationalize forbidden behavior with reality, *reason* and *choice* are more often observed in bolder relief after the act." Report by Committee on Forensic Psychiatry of The Group for the Advancement of Psychiatry, p. 11 (1953) (emphasis in the original).

The standard of criminal responsibility embodied in the "right and wrong" test has been forcefully and repeatedly condemned by judges,<sup>12</sup> criminologists,<sup>13</sup> and psychia-

<sup>12</sup> Justice Frankfurter has declared "I think the M'Naghten rules are in large measure shams." Quoted, *Report of the Royal Commission on Capital Punishment*, 1949-1953, 102 (Sept. 1953). Chief Judge Biggs of the Court of Appeals for the Third Circuit stated in a widely-noted dissenting opinion: "That these tests are very far from reality cannot we think be successfully disputed. Certainly, many competent medico-legal writers have so indicated and in our opinion they have proved their case." *United States v. Baldi*, 192 F. 2d 540, 566 (3rd Cir. 1951) (McLaughlin, Staley, J. concurring).

<sup>13</sup> Professor Sheldon Glueck, one of the nation's leading criminologists, has pointed out that there is uncertainty whether the test requires knowledge of right and wrong in general, or only knowledge of right and wrong respecting the particular act, or knowledge that the act is legally wrong, or morally wrong, or both. "From the point of view of legal interpretation alone, not



trists.<sup>14</sup> Virtually "everyone concedes that the present definition of insanity [as applied in criminal proceedings] has little relation to the truths of mental life." Cardozo, *Law and Literature*, 106 (1931). The Royal Commission on Capital Punishment in England concluded recently in a landmark report that

"In our view the test of criminal responsibility contained in the M'Naghten rules cannot be defended in the light of modern medical knowledge and modern penal views." *Report of The Royal Commission on Capital Punishment, 1949-1953*, 103 (Sept. 1953) (cited hereinafter as Report of Royal Commission).

The Report summed up the criticism of the "right and wrong" standard as follows:

"[T]he M'Naghten test is based on an entirely obsolete and misleading conception of the nature of insanity, since insanity does not only, or primarily affect the cognitive or intellectual faculties, but affects the whole personality of the patient, including both the will and the emotions. *An insane person may therefore often know the nature and quality of his act and that it is wrong and forbidden by law, but yet commit it as a result of the mental disease.* He may, for example, be overwhelmed by a sudden irresistible

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to indulge at this stage in psychological or psychiatric theory, this fountain-head of the modern right-and-wrong or knowledge tests has created more problems than it has solved. \* \* \* It would appear then that the right-and-wrong or knowledge test, at least as administered in some courts, must be criticized from the point of view of practicability alone: uncertainty of application is its characteristic rather than that clarity one should expect from a so-called test." Glueck, *Psychiatry and the Criminal Law*, 14 Virginia L. Rev. 155, 161 (1928).

<sup>14</sup> Numerous psychiatrists have denounced the "right and wrong" test. See e.g., Guttmacher and Weihoffen, *Psychiatry and The Law*, 406-408 (1952); Menninger, *The Human Mind*, 449-450 (1937 ed.); Zilboorg, *Mind, Medicine, and Man*, 246-297 (1943); Report of Forensic Committee, Group for the Advancement of Psychiatry, *supra*. The psychotic "knows intellectually the difference between right and wrong [but] he cannot grasp it emotionally . . ." Karpman, *Criteria for Knowing Right from Wrong*, 2 J. of Crim. Psychopathology, 376, 379 (1941).



impulse; or he may regard his motives as standing higher than the sanctions of the law; or it may be that in the distorted world in which he lives normal considerations have little meaning or value. (Id. at 80).

\* \* \*

*"It is well established that there are offenders who know what they are doing and know that it is wrong (whether 'wrong' is taken to mean legally or morally wrong), but are nevertheless so gravely affected by mental disease that they ought not to be held responsible for their actions. It would be impossible to apply modern methods of care and treatment in mental hospitals and at the same time to maintain order and discipline, if the great majority of the patients, even among the grossly insane, did not know what is forbidden by the rules and that, if they break them, they are liable to forfeit some privilege."* (Id. at 103).

In short, the "right and wrong" test enjoins

*"a verdict of guilty unless certain conditions are fulfilled, and these conditions ignore one of the commonest causes of irresponsibility due to insanity."* (Id. at 111).

The psychiatrist testifying below may well have declined to vouch for Appellant's capacity to discern right from wrong because these concepts "belong to ethics" and have no relation to "established psychiatric criteria of symptomatic descriptions" with rare exceptions. Guttmacher and Weihoffen, *Psychiatry and The Law*, 406-407 (1952); see Overholser, *The Place of Psychiatry in the Criminal Law*, 16 Boston U. L. Rev. 322, 329 (1936). Psychiatrists, in other words, characterize individuals in terms of symptoms and the impact of symptoms on behavior and not in terms of their capacity intellectually to differentiate right from wrong. Indeed

*"there is no developed scientific method of determining the existence of such knowledge of the nature*

and quality or the right and wrong as related to an act, or the lack of it. Nevertheless, the law in effect compels answers to invalid questions of 'knowledge' which cannot be met." Report by Committee on Forensic Psychiatry of the Group for the Advancement of Psychiatry, p. 15 (1953).

Pressed to its logical conclusion, the ruling of the court below, therefore, would virtually obliterate the insanity defense. As Dr. Gilbert pointed out below, "most mental cases can give you a categorical answer of right and wrong" (JA 41). In other words,

"except for totally deteriorated, drooling, hopeless psychotics of long standing, and congenital idiots—who seldom commit or have the opportunity to commit murder—the great majority and perhaps all murderers know what they are doing, the nature and quality of their act, and the consequences thereof, and they are therefore 'legally sane' regardless of the opinions of any psychiatrist." Zilboorg, *Mind, Medicine and Man*, 273 (1943).

The testimony of Dr. Gilbert was in effect dismissed by the court below as irrelevant because he would not venture an opinion that Appellant could not distinguish right from wrong on July 13, 1951. But, as we have shown, psychiatric testimony couched in the terminology of the M'Naghten rule is unnecessary to rebut the presumption of sanity or to create a reasonable doubt respecting sanity. Indeed, it is extremely doubtful that testimony by a psychiatrist in the ethical and nonscientific terminology of the M'Naghten rule would be entitled to consideration. Dr. Gilbert's testimony was relevant and competent and should have been assigned its due weight. By insisting that Dr. Gilbert fit his findings into categories which have no empiric significance, the trial court lost sight of the decisive issue.

**(b) The Insanity Test Should Focus on  
Competence to Regulate Conduct**

There is widespread agreement that the test of criminal insanity should be revised although there are many differences as to the precise verbal formula which can best reflect the desired change. There is, however, substantial accord that the emphasis should be placed upon the competence of the accused to conduct himself and to regulate his conduct in accordance with the norms of society.

The "irresistible impulse" test, to which the court below paid lip service (JA 50, 52), recognizes that ability to control oneself in accordance with understanding, and not knowledge itself, is the appropriate criterion of criminal responsibility. But "irresistible impulse" is an "inherently inadequate and unsatisfactory concept" because it

"carries an unfortunate and misleading implication that, where a crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict. In many cases, such as those of melancholia, this is not true at all. The sufferer from this disease experiences a change of mood which alters the whole of his existence. . . . The criminal act in such circumstances may be the reverse of impulsive. It may be coolly and carefully prepared; yet it is still the act of a madman." *Report of Royal Commission, op. cit. supra*, 109-110; see also Guttmacher and Weihoffen, *Psychiatry and the Law*, 408-415 (1952).<sup>15</sup>

The Royal Commission recommended that, if change in the M'Naghten test is made by amendment, the rule should provide as follows:

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<sup>15</sup> A psychiatrist asked to consider "whether the defendant had will power enough to resist the impulse to commit the act which he did commit" would "be unable to answer" because "from the psychological point of view, the impulse could not have been resistible, since the act was carried out in accordance with the impulse." Zilboorg, *Mind, Medicine, and Man*, 274 (1943).

"The jury must be satisfied that at the time of committing the act, the accused, as a result of disease of the mind (or mental deficiency) (a) did not know the nature and quality of the act or (b) did not know that it was wrong or (c) *was incapable of preventing himself from committing it.*" Report of Royal Commission, at 276.

This test is not far removed from that followed by the armed forces:

"A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged, *both to distinguish right from wrong and to adhere to the right.*" Manual for Courts Martial United States, p. 200 (1951).

Provisions in European penal codes follow the same line. Thus, the German Criminal Code provides that an act is not an offense "if the actor at the time of the commission of the act was either unable to realize the forbidden nature of his act or unable to act in accordance with proper understanding \* \* \*."<sup>16</sup> The Swiss penal code provides that any person "incapable of appreciating the unlawful nature of his act or of *acting in accordance with this appreciation* cannot be punished."<sup>17</sup>

The Royal Commission concluded that it would be most preferable

"to abrogate the M'Naghten Rules and leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind or mental deficiency and to such a degree that he ought

<sup>16</sup> The German law and provisions of the codes of other European nations are quoted by Keedy, *Irresistible Impulse as a Defense in Criminal Law*, 100 U. of Pa. L. Rev. 956, 970 (1952).

<sup>17</sup> Report of Royal Commission, p. 413.

not to be held responsible." Report of Royal Commission at 276.<sup>18</sup>

This in substance is the test followed in New Hampshire:

"Whether the Defendant had a mental disease \* \* \* seems to be as much a question of fact as whether he had a bodily disease; and whether the killing of his wife was the product of that disease, was also as clearly a matter of fact as whether thirst and a quickened pulse are the product of fever. That it is a difficult question does not change the matter at all. The difficulty is intrinsic, and must be met from whatever direction it may be approached. Enough has already been said as to the use of symptoms, phases, or manifestations of that disease as legal tests of capacity to entertain a criminal intent. They are clearly matters of evidence to be weighed by the jury upon the question whether the act was the offspring of insanity; if it was, a criminal intent did not produce it; if it was not, a criminal intent did produce it, and it was a crime." *State v. Jones*, 50 N.H. 369, 398-399 (1871)

Reform even more far-reaching has recently been urged by the Forensic Committee of the Group for the Advancement of Psychiatry, a prominent lego-medical organization

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<sup>18</sup> Four of the twelve members of the Commission dissented from this conclusion. One member favored retention of the M'Naghten rule and three believed that the suggested amendment, p. 26 *supra*, would be preferable to leaving the issue to the jury. Report of Royal Commission at 284-287. The Report noted that "the majority" of the American critics of the rule who testified before the Commission considered "that it would be unwise to dispense with any formula and simply leave the jury to determine on all the evidence whether the accused was insane or irresponsible. They felt that this would leave too difficult an issue to the jury, who would ask for further guidance and were entitled to receive it, and it would give too much latitude to psychiatrists." *Id.* at 106. The majority of the Royal Commission reasoned (a) that juries pay little heed to a formula and doubtless often simply ask themselves "Is this man mad or is he not?"; (b) that a formula unnecessarily complicates the question for a jury which possesses the competence and common sense to decide what is "essentially an ethical question". *Id.* at 112-116.



devoted to seeking rapprochement between law and psychiatry. The Committee recommends "the abolition of the McNaghten Rules" and in lieu thereof proposes that

"no person may be convicted of any criminal charge when at the time he committed the act with which he is charged he was suffering from mental illness."

"Mental illness" in turn is defined as

"an illness which so lessens the capacity of a person to use (maintain) his judgment, discretion and control in the conduct of his affairs and social relations as to warrant his commitment to a mental institution."

Acceptance of the recommendation by the Group for the Advancement of Psychiatry, or the Royal Commission proposal, or the New Hampshire test, would, in our view, represent a significant advance over the "right and wrong" test.<sup>19</sup> That test represented an enlightened step forward in its day over the pre-existing "wild beast"<sup>20</sup> or ability to count to "twenty pence" standards.<sup>21</sup> By the same token, the test of criminal insanity today should reflect the advances which psychiatry and allied disciplines have made to our understanding of human nature. Repudiation of the M'Naghten rule would permit psychiatrists to give straightforward testimony; such effect could be given to their findings as seemed appropriate, without the limitations imposed by an antiquated rule. Attention would be focussed on the

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<sup>19</sup> Defendants acquitted by reason of insanity "need not be set free" but may "be committed to a mental institution, thereby satisfying the interest of society both in the safety of the public and in the rehabilitation of the offender." *Tatum v. United States*, 190 F. 2d 612, 618 (D. C. Cir. 1951); see *Perry v. United States*, 195 F. 2d 37 (D. C. Cir. 1952). Section 24-301 of the D. of C. Code (1951 ed.) provides that "if an accused person shall be acquitted by the jury solely on the ground of insanity, the court may certify the fact to the Federal Security Administrator, who may order such person to be confined in the hospital for the insane \* \* \*."

<sup>20</sup> *Trial of Edward Arnold*, 16 How. St. Tr. 695, 764 (1724).

<sup>21</sup> Fitz Herbert, *New Natura Brevium*, 233 B. (9th Ed. 1794).



relevant consideration: the competence of the accused to govern his conduct in accordance with the norms of society.

### CONCLUSION

We believe that the solution to the specific question presented by this appeal is clear and unavoidable. The judgment below must be reversed on the ground that the Appellant was of unsound mind at the time of the commission of the crime.

We have suggested that the Court utilize this occasion to revise the M'Naghten rule because this case so vividly illuminates the necessity for such revision. By mechanically applying the "right and wrong" test, the Court below was led, we believe, to disregard critical facts. It compelled a psychiatrist to answer, or to decline to answer, questions which were in fact irrelevant to the issue at hand: Should Monte Wayne Durham be punished for his acts on July 13, 1951? Because of the "right and wrong" test the attention of the expert, the attorneys, and the Court was diverted from the reality of an inquiry into insanity into a barren, ritualistic channel. In this respect, Durham's trial was not unique. It merely presents, in more dramatic and obvious form, a phenomenon which is a commonplace in criminal practice.

We do not maintain that revision of the "right and wrong" test would answer all the problems raised by the issue of criminal responsibility.<sup>22</sup> We suggest merely that this change would be helpful and that it can be brought about by decision of this Court within the existing framework of criminal law administration. As Judge Biggs put it in *United States v. Baldi*, 192 F. 2d 540, 568 (3rd Cir. 1951) (dissenting opinion):

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<sup>22</sup> See Wechsler, *The Challenge of a Model Penal Code*, 65 Harv. L. Rev. 1097 (1952).

"Changes can be effected and reason can be brought to the law of criminal insanity. The rule of M'Naghten's case was created by decision. Perhaps it is not too much to think that it may be altered by the same means."

Revision of the M'Naghten rule would not impose a greater burden upon the courts or upon available psychiatric facilities. On the contrary, the change that we suggest commends itself in part because it would improve the effectiveness of psychiatric work in connection with the criminal law. It would make clear that psychiatrists are expected to examine individuals and to testify concerning them in the terms of their own discipline, and not in the terminology of an irrelevant formula. We are aware that psychiatric testimony is sometimes obscure, but the psychiatrist's problem is exacerbated and retarded by the impossible position in which psychiatrists are placed by obsolete legal formulas. Revision of the "right and wrong" test would enhance the calibre of psychiatric testimony; it would make work in the field of criminology more attractive to competent psychiatrists; and it would make available to judges and juries evidentiary material uncluttered by distortion and irrelevancies. Abandonment of this obsolete legal formula would eliminate an area of controversy which has tended to discredit the criminal law in the minds of many thoughtful persons. The door would be opened to greater cooperation between the law and the medical profession. It will, we hope, give greater impetus to useful developments in the administration of the criminal law.

It is by no means clear that substitution of the New Hampshire, or the Royal Commission, or the Forensic Committee test would result in a substantially larger number of persons being acquitted on grounds of insanity.<sup>23</sup>

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<sup>23</sup> The fear that revision of the insanity test would lead to successful evasion and imposture is groundless. On the difficulties in feigning insanity, see Cohen, *Murder, Madness, and The Law* 60-63 (1952).

But even if this were so it would not argue against the substitution of a better for a worse standard, particularly in this jurisdiction where procedure is available for commitment of the insane for treatment after acquittal by reason of insanity, note 19 *supra*. "If insanity is not to be a defense let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law." Cardozo, *Law and Literature*, 108 (1931).

Beyond this, we believe that a radically different approach to the problem of dealing with offenders against the criminal law deserves consideration. This approach would center on securing (a) the appropriate and most helpful treatment for each individual charged with an offense by psychiatric therapy or by disciplinary methods and rehabilitation and (b) the maximum protection and benefit to society. This method would require facilities for making judgments as to each individual and for his appropriate treatment. The courts would determine whether the defendant committed the act. The fact being ascertained, further disposition of the defendant would depend upon the judgment of trained personnel as to rehabilitation or therapeutic possibilities rather than upon judgments as to "responsibility".<sup>24</sup> Criminal administration would focus upon prevention and therapy in terms of the potentiality and responsiveness to therapy of each individual rather than upon conceptions of criminal "intent", which, however phrased, remain abstractions that are difficult to determine, awkward to administer, and often barren in results.

We do not suggest that all crime is due to insanity or

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<sup>24</sup> See Glueck, *Mental Disorder and the Criminal Law* 485-486 (1925); White, *Insanity and The Criminal Law* 168 (1923); Cardozo, *Law and Literature* 79-82 (1931).

that all criminals are insane.<sup>25</sup> Nor do we believe that psychiatry can furnish a complete answer to crime. We are aware, too, that

“psychiatry has many limitations, not the least of which is the enthusiasm that has led to exaggerated claims as to current accomplishments. The best psychiatry is still more of art than of science \* \* \*.”  
Sullivan, “Psychiatry”, 12 Encyc. So. Sci. 578, 580 (1934).

We believe, however, in the soundness of the contemporary trend to increasing and improving the use of psychiatric techniques and knowledge in determining the disposition of persons who have broken the law. Immediately, we respectfully suggest that an essential first step to better administration of the criminal law in this field is to abandon the M’Naghten rule.

For the reasons stated, the judgment of the Court below should be reversed and the case remanded to the District Court with instructions (i) to vacate the judgment; (ii) to discharge the Appellant from custody; (iii) to certify to the Federal Security Administrator, pursuant to D. of C.

<sup>25</sup> A “small group of psychiatrists \* \* \* hold the thesis that criminality is without exception symptomatic of abnormal mental states and an expression of them.” Karpman, *Criminality, Insanity and The Law*, 39 J. of Crim. Law and Criminology 584 (1949). Many distinguished psychiatrists are of contrary opinion. See e.g., Alexander and Staub, *The Criminal, The Judge, and The Public* (1931); Guttmacher and Weihoffen, *Psychiatry and The Law*, 87 et seq. (1952). Even if all criminals were mentally abnormal, it would not necessarily follow that punishment for crime should be eliminated. De Grazia, *Crime Without Punishment: A Psychiatric Conundrum*, 52 Col. L. Rev. 746, 754 (1952).

Code § 24-301 (1951 Ed.), that Appellant was acquitted of a criminal charge solely on the ground of insanity.<sup>26</sup>

Respectfully submitted,

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<sup>26</sup> Though the Code literally provides, Note 19 *supra*, for certification by the Court to the Administrator in the event of acquittal "by the jury" on the ground of insanity, we believe that certification where the case was tried to the Court is likewise contemplated. The Administrator presumably will require that Appellant "be confined in the hospital for the insane" only if it is ascertained that he is now mentally incompetent.





BRIEF FOR APPELLEE

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**United States Court of Appeals**

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11,859

MONTE W. DURHAM, APPELLANT

*v.*

UNITED STATES OF AMERICA, APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA

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LEO A. ROVER,

*United States Attorney.*

WILLIAM J. PECK,

GERARD J. O'BRIEN, JR.

*Assistant United States Attorneys.*

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*United States Court of Appeals  
For the District of Columbia  
Division of the Court  
Room 1200  
1000 ...*

*Filed ...  
CLERK*

STATEMENT OF QUESTIONS PRESENTED

By a certificate of the Superintendent of St. Elizabeths Hospital, February 18, 1953, appellant was declared of sound mind and restored to his reason; was thereafter tried on a pending indictment by the court upon waiver of a jury trial, and was found guilty as charged of housebreaking and larceny, March 20, 1953.

In the opinion of appellee, the following questions are presented:

1. Whether the certificate of the Superintendent of St. Elizabeths Hospital was not prima facie sufficient of appellant's sound mind and competency to stand trial; especially, when opportunity to challenge the certificate of the Superintendent was made available, and specifically waived by appellant?

2. Whether the prior state of appellant being declared of unsound mind pursuant to a judicial inquisition, and before a certificate of the Superintendent of St. Elizabeths Hospital with respect to restoration to a sound mind, may be used to speculate about the mental aptitude of appellant to intelligently waive jury trial?

3. Whether appellant was insane at the time of the commission of the crime, and pleaded in defense, in view of the fact that appellant could distinguish "right from wrong" with respect to his actions?

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# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 11,859

MONTE W. DURHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

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*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE DISTRICT OF COLUMBIA*

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BRIEF FOR APPELLEE

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## COUNTERSTATEMENT OF THE CASE

By an indictment filed August 8, 1951, appellant Monte W. Durham, with three other defendants, was charged with housebreaking and larceny, under the District of Columbia Code (1951), sections 22-1801, 22-2201 and 22-2202 (J.A. 54). Upon oral motion by counsel for Monte Durham, the court ordered that appellant be examined pursuant to section 4244, Title 18, U.S.C., by physicians of the psychiatric staff of Gallinger Municipal Hospital; and upon affidavits of the doctors conducting the mental examination as to appellant being of unsound mind, government counsel petitioned the court, on October 16, 1951, for a lunacy inquisition. (J.A. 55, 57, 58). The court ordered the inquisition, and thereupon made a finding that "Monte W. Durham is presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist

in his own defense." The Court ordered appellant committed to the custody of the Attorney General or his authorized representatives, on October 16, 1951, pursuant to section 4244, 18 U.S.C. (1946 Ed.), "until the said Monte W. Durham shall be mentally competent to stand trial, or until the pending charges against him are disposed according to law" (J.A. 60). On October 30, 1951, the court granted the oral motion of government counsel for severance as to appellant on the indictment (J.A. 60).

Thereafter, on February 12, 1953, the acting superintendent of Saint Elizabeths Hospital, Dr. Samuel A. Silk, requested the Attorney General to remove appellant to such other institution as is considered appropriate, pending the disposition of the charges against appellant according to law:

It has now been determined that Monte W. Durham is mentally competent to stand trial and is able to consult with counsel and properly assist in his own defense. (J.A. 61)

In conjunction with the letter of the acting superintendent, was a detailed analysis of the symptoms of appellant's "malinger" or simulation of insanity for the purpose of "evading responsibility for criminal offenses." (J.A. 61).<sup>1</sup>

On February 18, 1953, the superintendent of St. Eliza-

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<sup>1</sup> "Prolonged psychiatric study has established that this individual suffers from *psychological* illness but is *mentally competent* to stand trial and is able to consult with counsel to properly assist in his own defense. It is considered desirable to advise you that the diagnosis established by this hospital is Sociopathic Personality Disturbance, Antisocial Reaction. One of the manifestations occasionally observed in patients with this illness is the simulation of insanity for the purpose of evading responsibility for criminal offenses. This is of particular moment since this patient is consciously reluctant to be returned *for trial* and it is possible that he may simulate or mangle more severe mental disorder. It would appear desirable to call this to the attention of the medical authorities of the District of Columbia Jail so that all subjective manifestations of mental aberration will be scrutinized carefully. This, of course, does not obviate the fact that he has definite mental illness but is only to emphasize that his *illness is not the type considered to amount in degree to mental unsoundness* or to render him unfit for trial. (Emphasis supplied.)



beths Hospital, Dr. Winfred Overholser, in a letter to the Clerk of the District Court, further certified that:

“Monte W. Durham has recovered his reason and that he is now of sound mind and was discharged from treatment in said Hospital, February 18, 1953.” (J.A. 62)

The appellant was brought to trial on March 19, 1953, on the pending indictment, and waived jury trial on the advice of his counsel, with the consent of government counsel and sanction of the court (J.A. 64). Appellant was found guilty as charged, on March 20, 1953 (J.A. 65), and the grand larceny charge was reduced by the court to petit larceny (J.A. 17).

Appellant was thereupon remanded to the District of Columbia Jail, pending a report from the Probation Officer of the court. On March 26, 1953, appellant filed his own hand written motion for a new trial (J.A. 66), which motion was denied by the court, April 1, 1953 (J.A. 68).

On May 8, 1953, appellant on his own behalf, filed a petition for a writ of habeas corpus (J.A. 70), which petition was denied by the court, May 4, 1953.

Judgment and commitment was filed May 25, 1953, and the court sentenced appellant within the time statutorily allowed, to a term of three years to ten years imprisonment (J.A. 73). Notice of appeal was filed by the appellant on his own behalf, May 29, 1953 (J.A. 74).<sup>2</sup>

The evidence adduced may be summarized as follows:

In the early hours of the morning, July 13, 1951, at approximately 3:30 A. M., two officers of the Metropolitan Police Department received a call to go to 3030 “Q” Street, N. W., of the District of Columbia. Upon their arrival, one officer stood guard outside while the other entered the premises.

<sup>2</sup> The remaining procedural steps of appellant, brought on his own behalf, and recorded in the joint appendix are, as follows: A Motion to Enlarge Time, June 2, 1953, which was granted (J.A. 74); and a Motion in Arrest of Judgment, and For Dismissal of Case and For a Judgment of Acquittal notwithstanding Verdict, June 2, 1953, (J.A. 75), which motion was denied by the court after a hearing, June 19, 1953 (J.A. 87).

(J.A. 10). The entering officer, Fred Miller, testified that the front door of the house was ajar and a second inner door, three quarters glass, had the glass smashed. (J.A. 10).<sup>3</sup> Upon entering, the officer observed "a man crouching in the corner" of the dining room and ordered him "to get up and keep his hands in the air;" and as the man arose, he dropped a man's suit he was holding in his hands (J.A. 10, 11). Officer Miller identified appellant Durham, as the man thus captured (J.A. 11), along with three other men in the housebreaking.<sup>4</sup>

Appellant was taken to the No. 7 Precinct Police Station, was questioned by police detective, Pasquale D'Ambrosio, and the detective testified:

A. Monte Durham was question in regard to his part of breaking and entering the house at 3030 "Q" Street.

Q. What did he say?

A. He admitted his part in it.

The Court: Just what did he say?

A. He said, yes, he went there, that they had been drinking earlier in the evening over on "H" Street, Northeast and he, in company with a fellow by the name of Bishop, Davis and Satterwhite, and he said the police surprised him and two other fellows while

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<sup>3</sup> Q. How did you enter those premises? A. Through the front door. Q. What was the condition of the front door when you entered? A. The front door was ajar; it was complete wood door and that was ajar. Q. When you enter that front door what do you meet next? A. There is a second door, three-quarters of it partially glass and the bottom part wood. Q. What was the condition of that door? A. The glass part was smashed but the door was closed.

<sup>4</sup> A. We started searching on the first floor and when we got to the second room on our left, I believe it was the dining room—there were no lights in the place—we observed a man crouching in the corner of that room. Q. What did you do, if anything, with reference to the man you say you saw crouching in the corner? A. Told him to get up and keep his hands in the air. Q. Did he get up? A. He did. Q. What did you do? A. As he got up he had a suit in his hands, which he dropped on the floor. Q. Do you recall what kind of a suit that was? A. I believe it was a gabardine suit. Q. After he got up and threw the suit on the floor, then what happened? A. I took him outside and placed him in protection of my partner outside. Q. Did you place him under arrest? A. I did. Q. Who was that man you placed under arrest in that house? He was later identified to me as "Monte Durham."

they were in the process of going through the house. (J.A. 15)<sup>5</sup>

When appellant took the stand, his counsel asked him if he recalled being in the aforesaid premises in July, of 1951; and appellant answered, "No, sir, I don't" (J.A. 18, 19). Thereafter, appellant's counsel attempted to establish the defense of insanity at the time the crime was committed by appellant, July 13, 1951.

During cross-examination by government counsel, appellant claimed to be "mixed up," "confused" and lacking in memory as to where he was living in 1951 (J.A. 20); exactly where his mother was living in Washington (J.A. 20); how many times or how long he had been in Saint Elizabeths Hospital (J.A. 21); where he was working in 1951 (J.A. 20); or that criminal charges had been brought against him before (J.A. 23).<sup>6</sup>

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<sup>5</sup> The detective further testified it was appellant who implicated Satterwhite, as follows: "Well, Bishop and Davis were apprehended at the time, along with Durham, and Durham implicated the fourth member who was Satterwhite, and said that he could be reached at 1025 North Capitol Street, I believe" (J. A. 15).

<sup>6</sup> Q. Do you know where you are now? A. Yes, sir. Q. Where are you? A. In the court. Q. What. A. In the Court. Q. And what are you doing in the court here today? A. I don't know. Mr. Ahern came down and saw me and said that they had me charged with a housebreaking charge. Q. You are charged with housebreaking. Do you remember when you were arrested upon "Q" Street in Georgetown in 1951? A. No, sir. Q. Where were you living in 1951? A. Well, I don't know. I was sent to Saint Elizabeths. Q. Before you were sent to Saint Elizabeths, where were you living? A. Well, I don't know—I wasn't living— Q. What? A. I don't know; I was just around Washington. Q. Weren't you living with your mother? A. My mother used to see me when I was out at Saint Elizabeths. Q. Where did your mother live in the District of Columbia in 1951? A. She was living, where she was living, I don't know. Q. Where was that? A. In Washington. Q. Whereabouts? A. In Washington; I don't know. Q. Where does she live now? A. She lives over in Georgetown. Q. Whereabouts in Georgetown? A. On Dent Place. Q. How long has she lived there? A. All of her life. Q. Doesn't that refresh your recollection where you were living in 1951? A. I was born there. Q. So you have lived there all your life, is that right? A. Yes, sir. Q. What kind of work were you doing in 1951? A. I don't know. Q. You don't know? A. No. (J.A. 19, 20). \* \* \* Q. How many

Doctor Joseph L. Gilbert, chief psychiatrist, Gallinger Municipal Hospital, testified on behalf of the appellant, to the effect that he had examined appellant on September 3, September 22 and October 13, 1951, and had reached the conclusion of an unsound mind, as of those dates (J.A. 28).<sup>7</sup> Dr. Gilbert testified he had certified on October 9, 1951, at the original lunacy inquisition of Monte Durham, October 16, 1951, that appellant was suffering from "undifferential psychosis." (J.A. 28).

Appellant was released from St. Elizabeths Hospital, May 14, 1951, committed the crime of housebreaking and larceny, July 13, 1951, for which he was indicted, and the doctor was asked by defense counsel:

Q. Directing your attention specifically to July 13, 1951, will you give us your opinion as to the mental condition of the defendant at that time?

A. From my previous testimony and previous opinions times have you been committed to Saint Elizabeths Hospital? A. I don't know; I have been there a long time. Q. You have been there on two or three occasions—two prior occasions, haven't you? A. I don't know; I have been there. Q. And on those two occasions you were charged with housebreaking, weren't you? A. No, I wasn't charged; I was home then. Q. Then after the charges were dropped, then Saint Elizabeths let you out as being of sound mind, didn't they? A. I don't know. Q. And then you go right out and do it over again? A. I don't. Q. You what? A. I don't know. I have never been to court before (J.A. 21). \* \* \* Q. Are you cured now? A. No, sir. Q. In your opinion. A. No, sir. Q. What is the matter with you? A. You hear people bother you. Q. What? You say you hear people bothering you? A. Yes. Q. What kind of people? What do they bother you about? A. (No response.) Q. Let me ask you this, and I will put it in everyday language: You are not trying to fool the court, are you, so you won't have to face these criminal charges? A. No, sir. Q. Did you understand what I just said? A. Yes, sir. Q. What did I say? A. I just heard about fooling you, or something. Q. Fooling the Court so that you won't have to face these criminal charges; you are not trying to do that? A. No, sir. I don't know—I tell you, the people—you don't know what you are doing, you know.

<sup>7</sup> Drs. Joseph Gilbert and Amino Perretti were the examining psychiatrists at the original lunacy inquisition of Monte Durham, October 16, 1951. Dr. Gilbert certified at that time Monte Durham was suffering from "Undifferentiated Psychosis"; and Dr. Perretti certified Monte Durham was suffering from "Psychosis With Psychopathic Personality" (J.A. 55, 56, 57).



ion, to repeat it, it was my opinion that he had been of unsound mind sometime not long after a previous release from St. Elizabeths Hospital.

Q. Do you have the date of the previous release from Saint Elizabeths Hospital?

A. I have it from the Saint Elizabeths records—May 14, 1951—and from my examination of September and October, 1951, the symptoms dated back to a period not long after that during which—that is the information I have from Saint Elizabeths—and that the symptoms began to reappear while he was trying to work.

Q. In any event, is it or is it not your opinion that that period would have embraced the date July 13th?

\* \* \* \* \*

A. Yes, my examination would antedate that; that is, the symptoms obtained, according to my examinations, included that—the symptoms of the mental disorder.<sup>8</sup> (J.A. 28, 29)

Government counsel on cross-examination redirected the question of appellant's state of mind on July 13, 1951, to Doctor Gilbert:

Q. You were asked the specific question, Doctor, whether or not in your opinion on July 13, 1951, this defendant was of unsound mind and didn't know the difference between right and wrong. Can you express an opinion as to that?

A. Yes. It is my opinion he was of unsound mind.

Q. And didn't know the difference between right and wrong?

A. To a limited degree, yes, sir.

Q. What do you mean by that?

A. Well, if you asked him the question of right and wrong of a matter he could probably give you the right answer but nine of ten mental cases can do that.

Q. If you asked him a question and he was able to

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<sup>8</sup> The symptoms were stated to be: "Well, he was trying to work for a while, he stated, and while he was working at one of these People's Drug Stores he began to hear false noises and suffer from hallucinations and believed that the other employees and others in the store talked about him, watched him, and the neighbors did the same, watching him from their windows, talking about him, and those symptoms continued and were present through the time that I examined him in September and October."

give you the right answer, why would you say he was of unsound mind?

A. Because of the symptoms.

Q. Did he give the right answers to all the questions that you asked him?

A. No. There were times when he can't answer questions because of his mental condition. He could not answer some questions.

Q. Well, didn't you know whether or not he knew the answer to your questions?

A. Well, he didn't know the answer to all of them.

Q. Maybe because of his intelligence he didn't know the answer, couldn't that have happened?

A. Of course, he couldn't give the answer to all of the questions. (J.A. 29, 30).

On redirect examination appellant's counsel again propounded the question of Durham's ability to distinguish morally, "right from wrong":<sup>9</sup>

Q. Doctor, directing your attention to your examination of this defendant, and your opinion that you reached, would you say that he knew the difference between right and wrong on July 13, 1951; that is, his ability to distinguish between what was right and what was wrong?

A. As I have stated before, if the question of right and wrong were propounded to him he could give you the right answer.

The Court: No, I don't think that is the question, Doctor—not whether he could give a right answer to a question, but whether he, himself, knew the difference between right and wrong in connection with governing his own actions.

The Witness: Well, that's the question that arises in my mind.

The Court: If you are unable to answer, why, you can say so; I mean, if you are unable to form an opinion.

The Witness: I can only answer this way: That I can't tell you how much the abnormal thinking and the abnormal experiences in the form of hallucinations and

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<sup>9</sup> The court asked that this issue be once again examined into (J. A. 40).



delusions—delusions of persecutions—had to do with his anti-social behavior.

I don't know how anyone can answer that question categorically, except as one's experience leads him to know that most mental cases can give you a categorical answer of right and wrong, but what influence these symptoms have on abnormal behavior or anti-social behavior—

The Court: Well, your answer is that you are unable to form an opinion, is that it?

The Witness: I would say that that is essentially true, for the reasons that I have given. (J.A. 41)

At the close of the trial, the court made the following finding and decision:

I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind.

While, of course, the burden of proof on the issue of mental capacity to commit a crime is upon the government, just as it is on every other issue, nevertheless the Court finds that there is not sufficient to contradict the usual presumption of the usual inference of sanity.

There is no testimony concerning the mental state of the defendant as of July 13, 1951, and therefore the usual presumption of sanity governs.

While if there was some testimony as to his mental state as of that date to the effect that he was incompetent on that date, the burden of proof would be on the Government to overcome it. There has been no such testimony, and the usual presumption of sanity prevails.

The court finds the defendant guilty (J.A. 86, 87).

#### STATUTES INVOLVED

District of Columbia Code (1951 Ed.), Title 22, Sections 1801, 2201 and 2202, provide respectively:

#### Section 1801: *Housebreaking*

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank,

store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

#### Section 2201: *Grand Larceny*

Whoever shall feloniously take and carry away anything of value of the amount or value of \$50 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years.

#### Section 2202: *Petit Larceny*

Whoever shall feloniously take and carry away any property of value of less than \$50, including things savoring of the realty, shall be fined not more than \$200 or be imprisoned for not more than one year, or both. And in all convictions for larceny, either grand or petit, the trial justice may, in his sound discretion, order restitution to be made of the value of the money or property shown to have been stolen by the defendant and made way with or otherwise disposed of and not recovered.

United States Code of Criminal Procedure (1946 Ed.), Title 18, Sections 4244 and 4246, provide respectively:

#### § 4244. *Mental incompetency after arrest and before trial*

Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qual-

ified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury.

§ 4246. *Procedure upon finding of mental incompetency*

Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commitment shall be governed by section 4248 as herein provided.

SUMMARY OF ARGUMENT

I

Appellant, having been released from St. Elizabeths Hospital upon the certificate of the Superintendent thereof to the effect that appellant was restored to his reason and sound mind, was not entitled to a hearing on the question of whether he had been restored to his sanity; besides the fact, that section 4246 of Title 18, U.S.C. (1946 Ed.) is silent on

the question. The court offered opportunity to challenge the "ex parte certificate" of the Superintendent, which opportunity was specifically waived; therefore, appellant is without standing to allege any deprivation of due process.

## II

After appellant's counsel made a motion to waive a jury trial, the court instructed appellant of his constitutional right of trial by jury before receiving the affirmative assent of appellant to the waiver. With the approval of government counsel and sanction of the court, the assertion that appellant did not intelligently waive jury trial must be shown by demonstrable evidence rather than a mere speculation about appellant's mental aptitude.

## III

Where the evidence of the government revealed that appellant was captured, July 13, 1951, in the act of housebreaking and committing larceny; that appellant admitted his guilt to the police and informed on a fourth person involved in the crimes; it is submitted, established a prima facie case. Where no evidence in rebuttal was presented by appellant, other than inability to "remember" the incident, and the defense of insanity did not establish that appellant was incapable of distinguishing "right from wrong" with respect to his actions; the court was correct in finding the appellant guilty as charged.

## ARGUMENT

### I

**One Who Has Been Legally Adjudicated Insane, and Subsequently Certified by the Medical Authorities as Sane, or Otherwise Mentally Competent to Stand Trial, Has No Right to Another Proceeding to Determine Whether He Has Regained His Sanity.**

Appellant first urges that the trial court was in error when it made no "judicial determination" that appellant was of sound mind and competent to go to trial, and appel-

lant was thereby "deprived of his constitutional right of trial by jury."

Appellant, on the contrary, was accorded all statutory safeguards for mental defectives, pursuant to sections 4244 and 4246, of Title 18, U.S.C. (1946 Ed.), and was properly certified as to soundness of mind to stand trial by authorized medical psychiatrists, after a long period of observation and treatment.<sup>10</sup>

After an indictment brought June 6, 1951, appellant was given a lunacy inquisition, October 16, 1951, and upon the finding of "unsound mind", was committed to the custody of the Attorney General until "the said Monte W. Durham shall be mentally competent to stand trial or until the pending charges against him are disposed according to law."<sup>11</sup>

The federal statute is silent as to the method or manner of determining restoration to a state of mental competency to stand trial.<sup>12</sup> As is customary, a letter from the acting superintendent of St. Elizabeths Hospital, Dr. Samuel A. Silk, of February 12, 1953, informed the Attorney General that appellant was now mentally competent to stand trial and able to consult with counsel to properly assist in his own defense (J. A. 6). The doctor's letter cautioned, however, that appellant's mental illness<sup>13</sup> results in simulation or "malingering" of insanity for the purpose of "evading responsibility for criminal offenses",<sup>14</sup> was "consciously

<sup>10</sup> Confinement in St. Elizabeths Hospital was from October 26, 1951, to February 18, 1953 (J. A. 62).

<sup>11</sup> J.A. 60.

<sup>12</sup> Section 4246, Title 18, U.S.C. (1946 Ed.) provides in pertinent part: "Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed according to law."

<sup>13</sup> "Sociopathic Personality Disturbance, Antisocial Reaction".

<sup>14</sup> Gray's—Attorneys' Textbook of Medicine, No. 2, § 102.01: "Malingerers are guilty of fraud in regard to their health. Thus the term includes all conscious pretense, exaggeration, provocation of disease, and false allegations relative to cause. It includes con-



reluctant" to be returned for trial; but that, appellant's illness was not of the type considered to amount in degree to "mental unsoundness or to render him unfit for trial".

The superintendent of the hospital, Dr. Winfred Overholser, certified to the Clerk of the District Court, February 18, 1953, that:

Monte W. Durham has recovered his reason and that he is now of sound mind and was discharged from treatment in said Hospital, February 18, 1953. (J.A. 62)

Appellant thus came before the court for trial on the pending indictment, March 19, 1953, with the court understanding appellant to be of sound mind, or sufficiently competent to stand trial.

However, the court informed appellant's counsel that the court did not as a custom accept the "ex parte certificate of the Superintendent of St. Elizabeths" and would hold another lunacy hearing to determine present sanity, unless waived by admission of appellant's sound mind as was medically certified. (J.A. 7, 8).

Appellant's counsel waived any further inquiry and admitted to the soundness of appellant's mind to stand trial (J.A. 7, 8).

In a case of *Markham v. United States*, 184 F. 2d 512, 513 (4th Cir., 1950), wherein a defendant was indicted for murder, and upon motion of defense counsel was committed for examination as to his sanity;<sup>15</sup> after two months observation was declared sane and competent to stand trial; and the court proceeded to trial on the basis of the medical report, it was decided:

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cealment of pathological conditions. \* \* \* The hysteric is to be pitied, the malingerer condemned."

§ 102.02: "Malingering is not as common as formerly described. It is not as common as young doctors think. With added experience, the physician is less prone to make this diagnosis, less likely to use the term to cover a suspicion upon his part, or inability to explain peculiar findings. \* \* \* Only when the intent to mislead and the means used are damaging in consequence, positively proven to exist, and to consist of conscious fraud, should the patient be labelled a malingerer."

<sup>15</sup> Pursuant to section 4244, Title 18, U.S.C. (1946 Ed.).



Since it did not appear from the report of the psychiatrists that appellant was insane, it was not required by the statute that the court hold a hearing as to his mental condition at the time. Nevertheless, the trial judge made inquiry whether appellant desired a further hearing in the matter. \* \* \* No such waiver was required to enable the court to proceed with the arraignment and trial after the examining physicians had reported appellant sane, especially as the court had been advised that no further hearing was desired on the matter \* \* \*.

The prior determination of appellant being of "unsound mind" has been reversed due to psychiatric certification of present "soundness of mind", and appellant is essentially in the same position before the court that he was prior to the original lunacy hearing of October 16, 1951.

This Court, in the case of *Haislip v. United States*, 76 U.S. App. D.C. 91, 92-93, 129 F. 2d 53 (1942), recognized this same question of whether another hearing is required to restore sanity under the District of Columbia Code,<sup>16</sup> and stated, *inter alia*:

The lunacy inquiry of July 26, 1939, was for the purpose of determining whether the defendant was then capable of understanding the nature and objects of the proceedings so as properly to conduct his defense. The verdict of insanity spoke as of that date and was a legal determination that appellant was not then mentally qualified to stand trial. When, thereafter, he was restored to sanity, the certificate of the superintendent to that effect removed the previous bar. The sole effect of these sections is, in a proper case, to suspend the criminal proceedings during the period of insanity. The jurisdiction of the court continues, and when sanity is restored the case may proceed as if the interregnum had not occurred.

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<sup>16</sup> D.C. Code, 1940 §§24-301, 24-303; D.C. Code, 1951 §§24-301, 24-301. § 24-303, provides in pertinent part: "When any person confined in the hospital for the insane, charged with crime and subject to be tried therefore, shall be restored to sanity the superintendent of the hospital shall give notice thereof to the justice holding the criminal court and deliver him to the court according to its proper precept."

When appellant was discharged from St. Elizabeths Hospital by the Superintendent, on February 18, 1953, as having recovered his reason and sound mind, in the absence of anything showing the invalidity of the certificate of the Superintendent, the trial court had no alternative but to proceed with the trial on the suspended criminal indictment. The solicitous attitude of the court to inform appellant's counsel of his rights to challenge the certificate demonstrated judicial fairness, but was not availed of by counsel and specifically waived. (J.A. 7, 8).

Appellant might urge that the silence of the federal statute, with respect to a hearing or "constitutional jury trial" to determine restoration to sanity, is a violation of due process; but in the case of *United States v. Ragen*, 149 F. 2d 948, 950-951 (7th Cir., 1945), *cert. den.* 326 U.S. 791, the same issue arose upon a writ of habeas corpus under an Illinois incompetency statute<sup>17</sup> and the court decided:

The facts here are that petitioner, charged with committing an offense under the Illinois law, was found by a jury duly impanelled for the purpose, to have become insane after the alleged commission of the crime and was therefore committed to a state hospital to remain until he regained his sanity; thereafter a medical officer, presumably pursuant to his official duties, found that he had regained his sanity and recommended that he be returned for trial and, again we presume, pursuant to this recommendation and the duly authorized request of the state's attorney, he was discharged from the hospital and returned to the sheriff of the county where the indictment pended. There he was represented by counsel who raised no question as to the sufficiency of the administrative finding of sanity and order of discharge. We cannot say that these facts so transgress the requirements of due process as to raise a federal question. Nor can we agree with the District Court that the Illinois statute quoted requires a jury trial for

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<sup>17</sup> Section 593, Criminal Code, 38 Ill. R.S., provides in pertinent part: "And if, after judgment and before execution of the sentence, such person become lunatic \* \* \* then in case the punishment be capital, the execution thereof shall be stayed until the recovery of said person from the insanity \* \* \*".

restoration to sanity. As we read that statute it is silent as to the mode of determining that issue. \* \* \*.<sup>18</sup>

Actually, the method of a sanity inquisition in first instance, pursuant to section 4244, of Title 18 U.S.C. (1946 Ed.), is not defined by the statute and appellant would have no right to a trial by jury even under the inquisition held October 16, 1951. *McIntosh v. Pescor*, 175 F. 2d 95 (6th Cir., 1949).

In the absence of an abuse of discretion lodged in the trial court, *Neely v. United States*, 80 U.S. App. D.C. 187, 150 F. 2d 977 (1945), *cert. den.* 326 U.S. 768, or appellant raising by motion incompetency to stand trial, *Perry v. United States*, 90 U.S. App. D.C. 186, 195 F. 2d 37 (1951), appellant cannot complain of having to stand trial on a medical certificate of his competency to that effect.

## II

### **There Is No Evidence That Appellant Did Not Reasonably Understand the Instructions of the Court as to His Right of Trial by Jury, and His Waiver Thereof.**

The maintenance of the right of constitutional jury in a criminal case was here safeguarded, in that, before any waiver became effective, the consent of government counsel and the sanction of the court was had, in addition to the express consent of the defendant. The duty of the trial court in this regard, of course, is not to be discharged as a

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<sup>18</sup> See: *People v. Rice*, 83 Cal. App. 55, 256 P. 450 (1927); *State v. Rose*, 271 Mo. 17, 195 S.W. 1013 (1917); *Davidson v. Com.*, 171 Ky. 488, 188 S.W. 631 (1916); *Cum. v. Cilione*, 293 Pa. 208, 142 A. 216 (1928); *People v. Farrell*, 31 Cal. 576 (1867). In the case of *Com. v. Cilione, supra*, it was stated, at p. 219, *inter alia*: "It shows also that a prior finding of insanity, without more, is not enough in itself to require that the question of the prisoner's sanity at the time of a subsequent trial be submitted to the jury trying the case; \* \* \*. If counsel for defendant wished to raise the issue as to defendant's sanity at the time of trial, he should have petitioned the court for a preliminary inquiry—but neither course was pursued, and, under those circumstances, his exceptions to the action of the court below in proceeding with the trial of the case and admitting the evidence offered by the commonwealth will not avail him."

mere matter of rote, but with sound and advised discretion—increasing in degree as the offenses dealt with increase in gravity. *Patten v. United States*, 281 U.S. 276, 312-313, 50 S. Ct. 253, 74 L. Ed. 854 (1930).<sup>19</sup> However, as was stated by the Supreme Court, in *Adams v. United States ex rel. McCann*, 317 U.S. 269, 277, 278, 281, 63 S. Ct. 236, 87 L. Ed. 268 (1943), the unique circumstances of each case must be considered:

The question in each case is whether the accused was competent to exercise an intelligent, informed judgment—and for determination of this question it is of course relevant *whether he had the advice of counsel*. \* \* \*

And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case.  
\* \* \*

The *Patten* decision left no room for doubt that a determination of guilt by a court after waiver of jury trial could not be set aside and a new trial ordered except upon a plain showing that such waiver was not freely and intelligently made. If the result of the adjudicatory process is not to be set at naught, it is not asking too much that the burden of showing essential unfairness be sustained by him who claims such injustice and seeks to have the result set aside, and that it be sustained not as a *matter of speculation* but as a demonstrable reality. Simply because a result that was insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it. (Emphasis supplied.)

A person, without counsel, may execute a waiver; whereas, appellant in this instance had consent of counsel to the waiver.

The waiver of jury trial by appellant rests upon an adequate preliminary statement of the court delineating the rights of the accused with the implication thereby, that the accused reasonably comprehended his position and appreciated the possible effects of his choice. The court did not accept the motion of appellant's counsel to waive a jury

<sup>19</sup> See *Taylor v. United States*, 142 F. 2d 808 (9th Cir., 1944).



trial (J.A. 8); whereas it sought the consent thereto of appellant himself, wherein the court asked:

The Court: Monte W. Durham, you understand that you are entitled to a trial by jury, do you not?

A. Yes.

The Court: Does the Court correctly understand that you prefer to be tried without a jury and that you waive your right to trial by a jury?

A. Yes.

The Court: Very well. The Court will accept the waiver. You may proceed. (J.A. 8)

Any assumption of appellant not being competent and reasonably intelligent to comprehend his presence in court, the instructions of the court, and the charge against him,<sup>20</sup> is to ignore the psychiatric certificate with respect to the soundness of his mind. There is also to be weighed the warning of appellant's mental propensity to malingering or perpetrate fraudulent unsoundness of mind;<sup>21</sup> but there is certainly no evidence that appellant did not understand the questions of the court and his own act of waiver of jury trial.

<sup>20</sup> Q. Do you know where you are now? A. Yes, sir. Q. Where are you? A. In the court. Q. What? A. In the court. Q. And what are you doing in the court here today? A. I don't know. Mr. Ahern came down and saw me and said that they had me charged with a housebreaking charge. Q. You are charged with housebreaking. Do you remember when you were arrested up on "Q" Street in Georgetown in 1951?

<sup>21</sup> In contrast to appellant's apparent "stupor" at the trial, in that, (a) he claimed no memory of where he lived; (b) where his mother lived; (c) where he worked; (d) how many times or when he was confined in St. Elizabeths Hospital; (e) prior charges brought against him, or his arrest and commission of crime in this instant (J.A. 20-21); yet, three days after trial, he files in his own handwriting:

(a) A motion for new trial—alleging errors about a jury trial; assistant of counsel, and production of witnesses. (J.A. 66);

(b) Petition for writ of habeas corpus, raising issues of due process, and rights under the Sixth and Eighth Amendments to the Constitution (J.A. 70);

(c) A notice of appeal (J.A. 74);

(d) Motion to enlarge time (J.A. 74); and

(e) A motion in arrest of judgment (J.A. 75).

## III

**The Evidence Was Prima Facie Sufficient and Competent to Sustain the Decision of the Court; the Affirmative Defense of Insanity Was Not Sustained by Appellant**

There was no attempt by appellant during trial to rebut the prima facie case of the government as to his arrest, July 13, 1951, while in the process of housebreaking and committing larceny (J.A. 9 to 18). In this respect, appellant only asserted that he could not remember the incident. (J.A. 19, 20).

The affirmative defense of insanity pleaded at the trial, was never established, in that appellant was so mentally incompetent as to not know "right from wrong" on the day of his arrest, with respect to his crimes of housebreaking and larceny. (J.A. 41). In fact, defense witness, Dr. Joseph L. Gilbert, to the question of appellant's ability to distinguish between "right and wrong", replied that appellant "could give you the right answer" (J.A. 41); and Dr. Gilbert was unable to form a definite opinion as to whether appellant knew the difference between right and wrong in connection with his own actions (J.A. 41).

It was stated by this Court in the case of *Holloway v. United States*, 80 U.S. App. D.C. 3, 148 F. 2d 665, 666-667 (1945), with respect to an affirmative defense of insanity to a crime, that:

\* \* \* The ordinary test of criminal responsibility is whether defendant could tell right from wrong. A slightly broader test is whether his reason had ceased to have dominion of his mind to such an extent that his will was controlled, not by rational thought, but by mental disease. The application of these tests, however they are phrased, to a borderline case can be nothing more than a moral judgment that it is just or unjust to blame the defendant for what he did. Legal tests of criminal insanity are not and cannot be the result of scientific analysis or objective judgment. There is no objective standard by which such a judgment of an admittedly abnormal offender can be measured. They



must be based on the instinctive sense of justice of ordinary men. \* \* \*

\* \* \* It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, *whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane.*

A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.

The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. *These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion.* Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that *the verdict shocks the conscience of the court.* (Emphasis supplied.)

One may be, or may become of unsound mind, as appellant may incline, or be otherwise defective and in need of hospitalization and medical treatment, and still have had sufficient mentality to be legally accountable for his acts. *Garcia v. Steele*, 193 F. 2d 276 (8th Cir., 1951). With due deference to appellant's fraudulent addictions, the court, sitting in the capacity of a jury, made the following finding:

I don't think it has been established that the defendant was of unsound mind as of July 13, 1951, in the sense that he didn't know the difference between right and wrong or that even if he did, he was subject to an irresistible impulse by reason of the derangement of mind.

With a prima facie case established, it cannot be said in the light of *Davis v. United States*, 160 U.S. 469, 16 S. Ct. 353, 40 L. Ed. 499 (1895)<sup>22</sup> that evidence of a state of prior mental unsoundness and before the psychiatric certificate of saneness, settles a cover of doubt over the actions of appellant with respect to his mental objectivity to distinguish "right from wrong". Appellant's ability to intentionally deceive the unwary as to his legal culpability and the total inability of Dr. Gilbert to abstain from wandering in a twilight zone between abnormality and insanity, should preclude any attempt to overrule the conscience of the court with respect to its finding that no doubt was raised satisfactorily to obviate a judgment of guilt. *Curley v. United States*, 81 U.S. App. D.C. 389, 160 F. 2d 229 (1947), cert. den. 331 U.S. 824. There is at least present that "substantial evidence" which is the maximum necessary to sustain a conviction on appeal. *Glasser v. United States*, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680 (1942).

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<sup>22</sup> The Supreme Court in that case stated, p. 487, and as was concurred in by this Court, in *Tatum v. United States*, 88 U. S. App. D.C. 386, 389, 190 F. 2d 612 (1950): "Strictly speaking, the burden of proof, as those words are understood in criminal law, is never upon the accused to establish his innocence or to disprove the facts necessary to establish the crime for which he is indicted. It is on the prosecution from the beginning to the end of the trial and applies to every element necessary to constitute the crime. Giving to the prosecution, where the defense is insanity, the benefit in the way of proof of the presumption in favor of sanity, the vital question from the time a plea of not guilty is entered until the return of the verdict, is whether upon all the evidence, by whatever side adduced, guilt is established beyond reasonable doubt. If the whole evidence, including that supplied by the presumption of sanity, does not exclude beyond reasonable doubt the hypothesis of insanity, of which some proof is adduced, the accused is entitled to an acquittal of the specific offense charged."

## CONCLUSION

For the reasons assigned therefor, it is submitted that the judgment of the lower court should be affirmed.

LEO A. ROVER,

*United States Attorney.*

ARTHUR J. McLAUGHLIN,

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*Assistant United States Attorneys*



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

*For the District of Columbia Circuit*

FILED JUL 14 1954

No. 11,859

MONTE W. DURHAM, APPELLANT

*Joseph W. Stewart*  
CLERK

v.

UNITED STATES OF AMERICA, APPELLEE

## PETITION FOR REHEARING EN BANC

Comes now the appellee by its attorney, the United States Attorney, and moves this Court to permit a rehearing before the Court *en banc*.

In support whereof, the following is submitted:

(1) The power to order rehearings *en banc* is vested in this Court under 28 U. S. C. 46 (c). This discretionary power is most appropriately exercised where, as here, a case involves a question of extraordinary public importance. *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U. S. 247 (1954); *Stephens, Address*, 20 D. C. B. A. J. 103, 107 (1953). Certainly a decision explicitly rejecting the historic test of criminal responsibility and offering a substitute comes under this classification. Therefore it is respectfully submitted that a rehearing *en banc* is warranted.

(2) The issue of criminal insanity has been submitted to juries since 1843 in terms of the M'Naghten rules, recognized as the practice existent in this jurisdiction as early as 1882, as modified for the last quarter of a century by the doctrine of irresistible impulse. *M'Naghten's Case*, 10 Cl. & Fin. 200, 211, Eng. Rep. 718, 722 (1843); *Guiteau's Case*,

1 Mackey 498 (1882); *Davis v. United States*, 160 U. S. 469 (1895); *Smith v. United States*, 59 App. 144 (1929).

A determination of criminal responsibility was stated by this Court in *Holloway v. United States*, 80 U. S. App. D. C. 3, 4 (1945), to be "nothing more than a moral judgment that it is just or unjust to blame an accused for his criminal act". The degree of that blame had direct relation to the moral capacity of an accused to think and act rationally on his act, and if knowing it wrong and not irresistibly compelled to do the act by reason of derangement of the mind, then the law imposed responsibility.

The Supreme Court in *Leland v. Oregon*, 343 U. S. 790, 801 (decided June 9, 1952), cited *Holloway* for the proposition that ". . . choice of a test of legal sanity involves not only scientific knowledge but questions of basic policy as to the extent to which that knowledge should determine criminal responsibility". The longevity of the present rules indicates their practical utility; knowledge of the right and wrong is the exclusive test of criminal responsibility in a majority of American jurisdictions, *Leland v. Oregon, supra*, at 800, and the long survival of this basic test reflects the difficulty of substituting one having the virtue of equal precision.

It is of no minimal consequence to the community at large that a division of this Court has adopted a test of criminal responsibility that appears to alter materially our settled rule of moral responsibility.

Substitution of a new rule presents ". . . issues (that) are intricate enough to invoke the pooled wisdom of the circuit." *Western Pac. R. Corp. v. Western Pac. R. Co., supra*, at 271, (concurring opinion of Justice Frankfurter), and in view of this origin and history, it is respectfully submitted that the public interest would be served by an opinion reflecting the views of the Court *en banc* as to the need of any change.

(3) The Court has explicitly disapproved and rejected the "right and wrong test" as inadequate, not in step with "psychic realities and scientific knowledge", and has characterized it as "one symptom" that cannot be validly ap-



plied in all circumstances. The irresistible impulse test is also declared inadequate because the word "impulse" connotes immediacy and does not circumscribe mental illness characterized by brooding and reflection. The Court formulated a new test—"It is simply that an accused is not criminally responsible if his unlawful act was the product of mental disease or mental defect."

To fill the void the Court formulated the new test in an approved instruction, couched in the language of causality, but omitting any reference to a defendant's moral responsibility. The issue of moral responsibility is clearly implicit in the superseded test. To omit reference to it is to confuse a jury whose ultimate function, the Court recognizes in the opinion, is to make a moral judgment.

Moral responsibility is an unqualified standard. The trier of the fact should be forcibly reminded of this especially where, as here, legal insanity is described in terms of causality, a variable standard not clearly limited as to degree.

Finally, the Court's decision is one based on its power to change settled law in the light of reason and experience. It is respectfully submitted that just as the public had the benefit of the wisdom of all the judges in the formulation of the M'Naghten rules the public interest should be similarly served in devising any detailed guide deemed necessary for the future.

(S.) LEO A. ROVER,  
*United States Attorney.*

(S.) LEWIS CARROLL,  
*Assistant United States Attorney.*

(S.) JOHN D. LANE,  
*Assistant United States Attorney.*

(S.) GERARD J. O'BRIEN,  
*Assistant United States Attorney.*

#### CERTIFICATE OF GOOD FAITH

It is hereby certified that the instant petition is presented in good faith and not for delay.

(S.) GERARD J. O'BRIEN,  
*Assistant United States Attorney.*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing *En Banc*, has been mailed to attorney for appellant, Abe Fortas, Esq., 1229 Nineteenth Street, N. W., Washington, D. C., this 14th day of July, 1954.

(S.) GERARD J. O'BRIEN,  
*Assistant United States Attorney.*

